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Supreme Court, U.S.
FILED

98 1452 MAR 1 1 1999

No.______ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOSEPH AMATEL, *et al.*,
Petitioners,

v.

JANET RENO, Attorney General of the United States, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred by altering the carefully balanced, multi-factored test, established by this Court in *Turner v. Safley*, 482 U.S. 78 (1987), that applies to challenges to prison regulations that impact fundamental constitutional rights; expressly reducing the test to rational basis review in conflict with at least four other circuits?

2. Whether the court below erred in upholding under *Turner*, without any evidentiary support, a federal statute that flatly bans receipt by federal prisoners of a disfavored category of protected speech, despite the complete absence of any indication that such a flat ban was requested or needed by the prison officials entrusted with the security and rehabilitation of federal prisoners?

RULE 14.1(b) AND RULE 29.6 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the court of appeals whose judgment is sought to be reviewed is as follows:

Joseph Amatel
Lee Alphonso Moore
Daniel J. Levitan
Playboy Enterprises, Inc.
General Media Communications, Inc.
Periodical and Book Association of America
Janet Reno, in her official capacity
Kathleen Hawk, in her official capacity
J.D. Lamer, in his official capacity
Joel H. Knowles, in his official capacity
Stephen DeWalt, in his official capacity

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

None of the named petitioners has any corporate parent, subsidiary or affiliate which is publicly held. (For this purpose, members of trade associations have not been considered affiliates of such trade associations).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joseph Amatel, Daniel J. Levitan, Playboy Enterprises, Inc., General Media Communications, Inc. and Periodical and Book Association of America respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-49a) is reported at 156 F.3d 192. The opinion of the district court (*id.* at 50a-62a) is reported at 975 F. Supp. 365. The order of the court of appeals denying rehearing and suggestion for rehearing en banc (*id.* at 63a-64a) is not reported.

JURISDICTION

The court of appeals entered its judgment on September 15, 1998, and denied a timely filed petition for rehearing and suggestion for rehearing en banc on December 11, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Ensign Amendment, section 614 of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, § 614 is reproduced in the Pet. App. at 65a; the Bureau of Prison's implementing regulations, codified at 28 C.F.R. §§ 540.70-540.72 are reproduced in the Pet. App. at 66a-70a; relevant portions of the Bureau of Prison's Program Statement as revised to implement section 614, PS 5266.07, are reproduced in the Pet. App. at 71a-75a.

STATEMENT OF THE CASE

Introduction. This case involves a conflict among the circuits on the application of the *Turner* test -- the four prong test established by this Court by which prisoners' constitutional claims are to be assessed. Although the majority below purported to apply the test in evaluating a Congressional ban on the dissemination of an entire category of protected speech within federal prisons, the majority altered the test established by this Court, expressly reducing the *Turner* inquiry to mere rational basis review. The majority's decision reducing the *Turner* test to the level of scrutiny that is applied to statutes affecting economic rights conflicts with this Court's decisions in *Turner* and *Thornburgh*, and with the decisions of at least four courts of appeals.

Moreover, the majority's reduction of the carefully crafted *Turner* test to rational basis review nullifies constitutional rights in the prison context. Even a regulation that targets a prisoner's exercise of his religious beliefs because of distaste or animus toward the religion would be upheld under the majority's formulation of *Turner*, as long as the government could articulate, post hoc, a rationale that "might have" formed the basis for the regulation. The majority's interpretation thus eviscerates the "delicate balance" between constitutional rights and effective prison administration this Court struck in *Turner* and *Thornburgh*.

The Regulation of Federal Prisons Before the Ensign Amendment. Over a decade ago, this Court established the test that courts are to apply in assessing constitutional claims brought by prisoners. The Court made clear that prisoners retain their constitutional rights, including their First Amendment rights, although those rights are necessarily tempered to give prison authorities discretion to address the special needs of the prison environment. *See Turner v. Safley*, 482 U.S. 78, 84 (1987) ("[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (prisoners "clearly retain protections afforded by the First Amendment"). To balance these competing interests, this Court adopted a unique "standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint . . . and [to] the need to protect constitutional rights." *Turner*, 482 U.S. at 85 (internal quotations omitted) (alteration in original). That test directs courts to consider whether: (1) the challenged restriction is rationally related to a legitimate penological objective and operates in a neutral manner to further that objective; (2) alternative means of exercising the right remain open; (3) the accommodation of the constitutional right will have an adverse impact on other prisoners, staff, and resources; and (4) there are any ready alternatives that allow prisoners to exercise their rights at *de minimis* cost to the institution. *Id.* at 89-91.

Prior to passage of the Ensign Amendment, federal prison wardens regulated the prison environment pursuant to regulations promulgated by the Bureau of Prisons ("BOP"), the agency charged with responsibility for operating the federal prison system. These regulations granted wardens broad discretion to exclude expressive (and other) material from individual prisons if that material was deemed to be "detrimental to the security, good order, or discipline of the institution or if [the material] might facilitate criminal activity." 28 C.F.R. § 540.71(b). Although these regulations contained a list of material that might satisfy that standard, the regulations expressly forbade the rejection of a publication "solely because its content is religious, philosophical, social or sexual, or because its content is unpopular or repugnant." *Id.* Under these regulations, the warden or his designee was charged with reviewing publications sent into the prisons, and with applying his unique expertise to make individual determinations about the possible impact of the material. This Court reviewed and upheld this regulatory scheme in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), finding that it appropriately struck the "delicate balance" between providing wardens with sufficient discretion to maintain order and security and respecting the constitutional rights of prisoners and those who wish to communicate with them. *Id.* at 407.[1]

The Ensign Amendment and its Operation. The Ensign Amendment,[2] enacted as a rider to the Omnibus Consolidated Appropriations Act of 1997, fundamentally altered the regulatory regime upheld in *Thornburgh*. The Act targets a category of speech that is fully protected by the First Amendment and bans such speech from being distributed within federal prisons. Neither the Ensign Amendment nor its regulations are designed to ensure that non-protected obscene material -- which the Bureau of Prisons can unquestionably exclude from its facilities -- does not enter the prison environment. Instead, it is uncontested that the Ensign Amendment's blanket ban encompasses material that is otherwise fully constitutionally protected.

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[1] Although the *Thornburgh* Court found that the regulation was facially valid, it recognized that it may be unconstitutional in application. Thus, in the wake of *Thornburgh*, prisoners remained free to challenge the application of those rules on the ground that an individual exclusion was not reasonably related to the interest asserted by the government. Indeed, in *Thornburgh* itself, the court remanded to the district court for review of the individual exclusions challenged). *See*, *Thornburgh*, 490 U.S. at 419.

[2] The statute was named after its principal sponsor, Representative John Ensign.

Specifically, the Act prohibits the Federal Bureau of Prisons from distributing or otherwise making available to prisoners "any commercially published information or material" that is "sexually explicit" or "features nudity" in whatever form (magazine or book), from whatever sender (commercial publisher, bookstore, private individual). Pub. L. No. 104-208, § 614, 110 Stat. 3009 (Sept. 30, 1996). Regulations enacted by the Bureau of Prisons to implement the Act define a publication which "features" nudity as a "publication [that] contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues." 28 C.F.R. § 540.72(b). "Nudity" is defined as "a pictorial depiction where genitalia or female breasts are exposed."

Before enacting this broad-based ban, Congress held no hearings. It issued no committee reports, and there was no discussion of the statute in any Conference Report. No statutory findings support the Ensign Amendment. Nor is there any evidence in the record indicating that Congress passed the Ensign Amendment in response to any real or perceived threat in federal prisons. In fact, although the government later asserted that the interest underlying the ban was rehabilitation, what limited legislative history there is suggests that Congress' purpose was to deprive prisoners of access to all publications containing nudity and sexually explicit material because those who had committed crimes did not deserve to have access to such material. *See* 142 Cong. Rec. H8254, H8261-62 (daily ed. July 24, 1996).

The Bureau of Prisons played no role in the Ensign Amendment's formulation or passage. The ban was not passed in response to a request from the BOP. No prison official testified in support of the Ensign Amendment. Nor is there any evidence in the record that prison officials believed such a ban was necessary or desirable, or that the BOP's existing regulations did not adequately serve the government's penological interests. Indeed, the statute strips prison officials of the discretion they have historically exercised to determine whether a particular publication would have a detrimental impact in their facility. Publications which, in the judgment of prison officials, do not pose a threat to rehabilitation, and which for decades routinely have been allowed into federal prisons, are now banned. Even if a warden expressly determines that a publication containing nudity or sexually explicit material would not negatively affect the prison at all, under the Ensign Amendment that material is banned. The BOP regulations implementing the Ensign Amendment require the immediate return to the publisher or sender of any commercial publication based *solely* on its sexual content. 28 C.F.R. § 540.72.

Proceedings Below. In 1997, pursuant to the Ensign Amendment, Joseph Amatel, Daniel J. Levitan and Lee Alphonso Moore -- each of whom was incarcerated in the federal prison system -- were denied receipt of magazines to which they subscribed.[3] Each filed separate suits, alleging that the Ensign Amendment violates the First Amendment. Their claims were consolidated with those brought by a publishing trade organization and publishers whose magazines had been rejected based on the Ensign Amendment's ban.

Plaintiffs moved the district court for an order preliminarily enjoining enforcement of the Ensign Amendment, and filed discovery requests designed to elicit evidence that the purpose of the Ensign Amendment was not "legitimate" and "neutral," and that the flat ban was, in any event, an "exaggerated response" to any legitimate interest the government might assert. The government opposed plaintiffs' motion for a preliminary injunction, arguing that the Ensign Amendment furthered the government's generalized interest in rehabilitation.[4] The government did not argue -- and has never argued -- that the governmental interest underlying the Ensign Amendment is security or discipline or good order. The government did not, and has not, suggested that prisoners' receipt of the material banned by the Ensign Amendment leads directly or indirectly to violence against other prisoners or against prison personnel. Indeed the government has never suggested that the material banned by the Ensign Amendment makes it more difficult to control the prison environment in any way. Nor did the government ever suggest that existing regulations were insufficient to address any security problem with prisoner behavior should it occur, regardless of the material to which the behavior was linked.

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[3] Petitioner Amatel has since been released from the federal prison system and is in the custody of the state prison system of New Jersey. Lee Alphonso Moore does not join in this petition for a writ of certiorari. Petitioner Levitan continues to be incarcerated in the federal prison system.

The district court granted plaintiff's motion for a preliminary injunction and *sua sponte* converted the injunction to a permanent injunction. Applying the test set forth by this Court in *Turner v. Safley*, 482 U.S. 78, 84 (1987), and refined in *Thornburgh*, the district court held that the Ensign Amendment failed to satisfy the first factor of that test -- "whether the governmental objective underlying the regulations at issue is legitimate and neutral, and [whether] the regulations are rationally related to that objective." *Thornburgh*, 490 U.S. at 414. Although the court accepted the government's asserted interest in rehabilitation as legitimate, the court concluded that the statute was neither neutral nor rationally related to that interest. Because the statute's "distinctions on the basis of content were not drawn solely with a view to the implications for rehabilitation," the court found that the Ensign Amendment violates the first *Turner* prong. Pet. App. 59a. Contrasting the statute to the regulations upheld in *Thornburgh*, the court held:

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[4] The government did not specify any particularized rehabilitatitive concern. Instead, it simply asserted that "[t]he Ensign Amendment . . . is rationally related to the legitimate and neutral penological objective of rehabilitation." Memorandum in Support of Motion to Dismiss, Civ. A. No. 96-2774, at 6 (D.D.C. filed May 21, 1997).

> The Ensign Amendment on its face does exactly what the [*Thornburgh*] regulations did not do: it restricts materials based solely on sexual content. Nothing in the statute or its history indicates any finding by Congress, or even belief on its part, that prohibition of sexually explicit materials or those featuring nudity would have further[ed] rehabilitative goals in a manner that prohibition of other materials would not.

Pet. App. 59a. Thus, the court concluded, the statute "is facially violative of the First Amendment," because it "violates the 'neutrality' prong," of the *Turner* test. *Id.* at 60a.[5]

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[5] The government also moved the court for a protective order, arguing that discovery "would add nothing to the Court's consideration of the pending motions." Defendants' Motion for Protective Order Civ. A. No. 96-2774, at 4-5 (D.D.C. filed June 13, 1997). Although the plaintiffs agreed with the district court that the statute was so irrational that it necessarily failed the first *Turner* prong, they made clear that if any inquiry into the relationship between the ban and the asserted governmental interest was required, they would need the opportunity to develop a factual record. "What we don't want to have happen," counsel noted on the record, "is to litigate this case . . . without a factual record, get to the Court of Appeals, and have the Court of Appeals reverse and leave us without an opportunity to [develop the record] later." Transcript of Motions Hearing, Civ. A. No. 96-2774, at 39:19-20, 23-24 (D.D.C. June 25, 1997). The district court found that it did not need evidence to determine that the Ensign

A divided panel of the D.C. Circuit reversed. Citing a case involving property tax regulation subjected to rational basis scrutiny, the majority first concluded that the first prong of the *Turner* test requires the same sort of rational basis inquiry. The majority concluded that the first *Turner* requirement met this level of scrutiny because rehabilitation -- broadly defined to include the "inculcation of democratic values," Pet. App. 13a, and "character-moulding," *id.* at 14a -- is a legitimate and neutral penological interest. In addition, the majority held that a total ban on distribution of all sexually oriented publications to all prisoners is reasonably related to the government's interest in rehabilitation. According to the majority, Congress could rationally have seen a connection between all publications that are sexually explicit or feature nudity and rehabilitation of prisoners because "Congress might well perceive pornography as tending generally to thwart the character growth of its consumers." *Id.* The majority found it irrelevant that there was *no* evidence presented that Congress found a connection between the speech banned and the later asserted goal of rehabilitation. Likewise, the majority found it irrelevant that there was *no* evidence in the record that this asserted connection has any basis in fact. Indeed, the majority expressly acknowledged that "[t]here is, of course, no 'record evidence' . . . to support this belief," *id.* at 15a and that the academic authority suggesting that there is no causal link between sexually oriented material and recidivism is "at least as substantial, and quite possibly more so," *id.* at 17a, than the scholarship supporting such a causal connection. Nonetheless, the majority held that *Turner* does not require any evidence at

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Amendment was facially invalid, and therefore granted the government's motion for a protective order, precluding plaintiffs from obtaining discovery or developing a factual record.

all, but instead permits incursions on First Amendment rights so long as Congress *could have* made a "commonsensical intuitive judgment[]." *Id.* at 15a.

The majority then turned to the final three *Turner* factors which, collectively, are designed to allow plaintiffs to demonstrate that the challenged regulation is an exaggerated response to the government's interest. The majority acknowledged that plaintiffs had been prevented from obtaining discovery and had not been afforded an opportunity to demonstrate that, even if there may be some relationship between some prisoners' receipt of adult material and their rehabilitation, the categorical ban on all prisoners receipt of any sexually oriented publication featuring nudity was grossly overbroad and was thus an exaggerated response to even the asserted governmental interest. Nonetheless, the majority found as a matter of "common sense" that the three remaining *Turner* factors were satisfied. *Id.* at 20a.

The second *Turner* factor requires courts to ask "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. The majority conceded that the Ensign Amendment imposes a flat ban on the receipt of all material covered by the Amendment as implemented by the regulations. Pet. App. 3a n.1 (noting that in this context, "the refusal to fund functions the same as an outright ban"). The majority attempted, however, to dismiss the significance of that fact by commenting that "unless there is some minimum entitlement to smut in prison, the origins of which must be obscure, this factor can hardly be fatal." Pet. App. 19a-20a.

The third factor directs courts to consider any adverse impact "on guards and other inmates, and on the allocation of prison resources" caused by exercise of the right in question.

Turner, 482 U.S. at 90. The majority concluded that this factor was satisfied on a basis *never* asserted by any party, including the government. "[I]f Congress may reasonably conclude that pornography increases the risk of prison rape," the majority asserted, "the adverse impact is substantial. Accommodating the right poses a threat to the safety of guards and other inmates." Pet. App. 19a.[6]

Finally, the majority held that the fourth *Turner* factor was satisfied because there were no "obvious, easy alternatives. . . that fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91. Although the Court in *Thornburgh* had upheld the publication-by-publication review conducted under the pre-Ensign BOP regulations, the majority rejected plaintiffs' argument that simply amending these regulations to authorize wardens to exclude publications that pose a threat to rehabilitation constitutes an "obvious, easy alternative." In the view of the majority, this option is arbitrary and burdensome. Pet. App. 46a.

The dissent sharply criticized the majority's interpretation of the *Turner* test:

> To read *Safley* -- as the majority appears to -- as permitting unblinking deference to any 'plausible' legislative judgment about the 'rehabilitative' benefits of denying a prisoner's most fundamental constitutional right, i.e., her freedom to read, renders any and all prisoners'

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[6] There was absolutely no evidence in the record that suggested that the presence of adult material in prisons leads to an increase in prison rape. Moreover, as discussed *supra*, the pre-existing BOP regulations already allowed wardens to exclude *any* publication -- including sexually explicit material -- deemed detrimental to the security, good order, or discipline of the institution.

> constitutional rights a nullity. I had thought it went without saying that courts do not rely on the mere assertion of a regulation's drafters that the regulation is reasonable; to do so would amount to an abdication of our judicial role.

Pet. App. 29a (Wald, J. dissenting).

Noting that she might "have been able to go along -- as the majority does here -- with deferring to Congress had the government seen fit to proffer evidence that links a ban on the prohibited publications to rehabilitation or if the connection between that ban and rehabilitation was so self-evident that no further evidence was necessary," the dissent stated that because "neither event has occurred" she could not agree with the majority's conclusion that the Ensign Amendment satisfies the first *Turner* prong. *Id.* at 36a. In so doing, she stressed the "amorphous and ill-defined" quality of the government's asserted rehabilitation interest. *Id.* at 39a-43a.

The dissent would also have found that the statute failed the remaining *Turner* prongs. As to the second factor, the dissent argued that "it cannot be viewed so broadly as to eliminate any reason for analysis (or as unhelpfully as the majority's sardonic reference to an 'entitlement to smut')." *Id.* at 45a. The third prong could not be satisfied, she stated, because "there is no evidence by which to judge whether permitting certain inmates to view publications that are sexually explicit or that feature nudity will have an adverse effect on the rehabilitation of other inmates." *Id.* at 46a. And finally, the dissent concluded that the fourth factor could easily be satisfied by reverting to the publication-by-publication review conducted under the pre-Ensign BOP regulations. The

Supreme Court's approval of that policy in *Thornburgh*, she stated, eliminates any concern that this option would be burdensome or arbitrary. *Id.* at 46a.

REASONS FOR GRANTING THE PETITION

The Court should accept this case to resolve a conflict among the circuits about the proper interpretation of the *Turner* test. Although this case involves sexually-oriented speech, the question presented by this case does not depend on the nature of the material banned. Instead, this case presents the purely legal question of the proper scope and application of the test which applies to *all* challenges to prison regulations affecting constitutional rights. As set out below, the majority altered the carefully crafted *Turner* test by expressly reducing it to mere rational basis review. The majority's interpretation of the *Turner* test is thus inconsistent with *Turner* and with *Thornburgh*, and conflicts with the interpretation of the *Turner* test adopted by at least four other circuits. Plenary review is appropriate to resolve the conflict and provide certainty in this important area of the law.

I. THE MAJORITY'S INTERPRETATION OF THE FIRST PRONG OF THE *TURNER* TEST CONFLICTS WITH THAT OF AT LEAST FOUR OTHER CIRCUITS, AND WITH THIS COURT'S DECISIONS IN *TURNER* AND *THORNBURGH*.

The first prong of the *Turner* test requires reviewing courts to determine whether "the governmental objective underlying the regulations at issue is legitimate and neutral, and [whether] the regulations are rationally related to that objective." *Thornburgh*, 490 U.S. at 414; *see also Turner*, 482 U.S. at 89-90. Although Congress had before it no evidence of any problem with rehabilitation that could be linked to allowing material containing nudity into prisons, and although the court below had before it no evidence demonstrating such a link, the majority below accepted the government's post hoc assertion that rehabilitation was the governmental purpose underlying the Ensign Amendment's ban. The majority also determined as a matter of "common sense" that the relationship between the sweeping ban and the government's amorphous interest in rehabilitation was rationally related. In doing so, the majority expressly reduced the first *Turner* prong to mere rational basis in review, in conflict with the interpretation of that prong reached by at least four other circuits.

Despite the lack of legislative findings to support its assertion, the government alleged that the Ensign Amendment was passed to further some undefined rehabilitative purpose. The majority accepted the government's assertion of the purpose of the statute without question, and noted that rehabilitation is a legitimate governmental interest. Pet. App. 8a-9a. The majority also essentially dismissed the requirement that the governmental interest be "neutral." Although the Ensign Amendment plainly requires the exclusion of material based solely on content, the majority nonetheless found that it met *Turner's* "rather thin neutrality requirement," because the government had asserted -- without evidentiary support -- that its purpose was unrelated to the suppression of expression. *Id.* at 10a-11a.[7]

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[7] In *Thornburgh*, the Court reviewed regulations which referenced material based on content, but expressly prohibited the exclusion of material *solely* based on content. Because the regulations made reference to content, the Court found the neutrality question to be "closer" than in prior cases. *Thornburgh*, 490 U.S. at 415. The majority below made no effort to reconcile its effective dismissal of the neutrality requirement with the *Thornburgh* Court's careful scrutiny of the pre-Ensign Amendment regulations.

The majority then turned to "whether there is a 'valid rational connection' between the interest and the regulations." Pet. App. 14a. Despite the fact that the government had introduced *no* evidence to demonstrate any link between the material banned -- including material containing mere nudity -- and an increase in recidivism, and despite the fact that plaintiffs had been prohibited from discovering and introducing evidence that would show the contrary, the majority found that a "valid" connection had been demonstrated. *Id.* at 18a-19a.

The majority was able to reach this conclusion only because it equated the first *Turner* prong with a rational basis inquiry. The majority opined that "[p]rison jurisprudence is not well enough developed to indicate precisely how demanding the requirement of rational means-end connection is." Pet. App. 14a. The majority concluded, however, that "as far as the means-end fit is concerned, *Safley's* standard is, if not identical, something very similar" to the rational basis standard applied in *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Pet. App. 14a. A rational relationship existed between the Ensign Amendment's total ban on prisoners' receipt of adult material and rehabilitation, the majority concluded, because "the government *could* rationally have seen a connection between pornography and rehabilitative values," and Congress "*might well*" have perceived "pornography as tending generally to thwart the character growth of its consumers." *Id.* at 15a-16a (emphasis added). The fact that the record was utterly devoid of evidence that supported such a connection -- whether scientific or based on the practical experience of wardens -- was deemed irrelevant. "The question for us," the majority concluded, "is not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would." *Id.* at 14a.

The majority's interpretation and application of the first prong of *Turner* conflicts with at least four other circuits that have required the government to demonstrate both that the interest asserted is, in fact, the interest underlying the challenged regulation and that a reasonable relationship exists between that interest and the regulation at issue. The Seventh Circuit, for example, has squarely rejected the argument that, under *Turner*, a reviewing court may simply accept any rationale posited by the government as long as that *might* be the rationale underlying the ban, as well as the argument that the government need not introduce evidence that demonstrates a link between the government's asserted interest and the challenged action. Instead, the Seventh Circuit has stated that, in reviewing a challenge under *Turner*, "we need information. . . . The prison administration 'cannot avoid court scrutiny by reflexive, rote assertions.'" *Shimer v. Washington*, 100 F.3d 506, 509-10 (7th Cir. 1996).

In *Shimer*, an inmate challenged a regulation that prohibited prison guards from writing directly to the parole board; Shimer alleged that this policy violated the First Amendment because he had asked guards to write letters supportive of his request for parole and, he claimed, but for the challenged policy they would have done so and he would have been released. The prison administration defended its policy on the ground that it protected guards from retaliation for negative evaluations, and that it guarded against bribery and intimidation of guards. *Id.* at 510. Although these were plausible state interests, the court rejected them because the state had introduced no evidence of an actual connection between the interest asserted and the ban, and "[e]vidence to suggest this connection should be at the heart of the *Turner* analysis." *Id.*

The Seventh Circuit applied this same analysis in a case involving religious rights. In *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988), an inmate challenged a prison grooming regulation on that ground that it prevented him from wearing dreadlocks, in violation of his religious beliefs. The government defended the regulation on the ground that allowing an exception to grooming rules for African-American inmates could lead to resentment and resulting violence. Although this was not an implausible assertion, the court rejected the government's interest because it was unsubstantiated. "[T]o suppose that the wearing of dreadlocks [as an expression of religious belief] would lead to racial violence is, on this record, the piling of conjecture upon conjecture. The potential infringement of the free-speech clause of the First Amendment is too plain to warrant comment." *Id.* at 963-64.

The Ninth Circuit has interpreted *Turner* in the same manner as has the Seventh. *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990), for example, involved the forced seizure of blood samples from inmates. When the plaintiff refused to allow prison nurses to draw his blood without his consent, prison guards threatened to subdue him with the use of tazer guns. Walker sued, asserting that the involuntary withdrawal of his blood following the threatened use of force violated the Fourth and Eighth amendments. The government defended on the ground that the blood test was needed to ascertain whether a given inmate had AIDS, and that a mandatory AIDS test "clearly has a logical connection to legitimate governmental interests" because it "'bears a logical connection to the health, safety and welfare of all of the inmates in . . . custody" and to the "interests of public health generally.'" *Id.* at 387.

The court found "[s]uch conclusory assertions . . . wholly insufficient to sustain the government's burden. . . ." *Id.* In doing so, the court rejected the notion that under *Turner* the government need only put forth a plausible rationale for a regulation that affects constitutional rights. Instead, the court made clear that government officials "cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interest involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interest. *An evidentiary showing is required as to each point.*" *Id.* at 386 (emphasis added); *see also Swift v. Lewis*, 901 F.2d 730, 731-32 (9th Cir. 1990) (reversing the district court's grant of summary judgment against a challenge that a grooming policy precluded Sikh prisoners from wearing their hair long because, although the asserted governmental interests were all legitimate, the government had "failed to provide any evidence that the interests they have asserted are the actual bases for their grooming policy").

The interpretation of the first *Turner* prong adopted by the Seventh and Ninth Circuits is in direct conflict with the majority's "rational basis" approach. Each of these courts has rejected the analysis adopted by the majority below, and instead concluded that, under *Turner*, courts cannot uphold a regulation that infringes on prisoners' fundamental rights by simply asserting, post hoc, a legitimate rationale which may, or may not, underly the regulation. Instead, these courts have squarely held that *Turner* requires the government to demonstrate that the government is acting in response to a real problem, and that the "solution" bears a rational relationship to the problem identified.

The Sixth and Tenth Circuits have reached the same conclusion as the Seventh and Ninth Circuits, and have rejected the argument that the first *Turner* prong is satisfied if the government simply posits a rational connection between an asserted interest and the challenged regulations. *See, e.g., Muhammad v. Pitcher*, 35 F.3d 1081, 1085 (6th Cir. 1994) (invalidating prison regulation because "there is no evidence in the record supporting Defendants' factual claim" that regulation was reasonably related to an interest in conserving resources); *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995) (invalidating restrictions on contact visits with attorneys because "defendants were unable to provide any evidence the restrictions on contact were reasonably related to prison security"). Thus, the intepretation of the first *Turner* prong reached by four other circuits is in direct conflict with the result reached by the majority below.

The reason these courts of appeals have not interpreted the first prong of the *Turner* test as mere rational basis review is plain. The version of the *Turner* test adopted by the majority below would effectively allow the government to categorically ban *any* type of speech -- including political or religious speech -- as long as it is able to posit any conceivable penological interest with respect to any prisoner. Under the test employed by the majority, for example, a regulation banning all works by Malcolm X or Karl Marx would be upheld if the government simply hypothesizes, after the fact, that certain prisoners may become violent upon reading such material, even if the government introduces no evidence that its hypothesis is well-founded or that its purported goal is furthered by such a restriction.

Moreover, under the majority's test prisoner plaintiffs have no right to present facts that tend to disprove the government's assertions. As the dissent below recognized, the majority's unprecedented interpretation of the first *Turner* prong "as permitting unblinking deference to any 'plausible' legislative judgment about the 'rehabilitative' benefits of denying a prisoner's most fundamental constitutional right . . . renders any and all prisoners' constitutional rights a nullity." Pet. App. 29a-30a (Wald, J., dissenting). The majority's interpretation of the first *Turner* prong thus conflicts not only with the interpretation of that prong reached by at least four other courts of appeals, it conflicts with this Court's express statement that the *Turner* test "is not toothless." *Thornburgh*, 490 U.S. at 414.[8]

II. THE MAJORITY'S INTERPRETATION OF THE REMAINING *TURNER* FACTORS CONFLICTS WITH THAT OF OTHER CIRCUITS, AND WITH THIS COURT'S DECISIONS IN *TURNER* AND *THORNBURGH.*

The majority's decision also eviscerates the remaining prongs of the *Turner* test, expressly reducing the carefully crafted, four-pronged *Turner* inquiry to rational basis review.

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[8] This Court's decision in *Turner* itself makes clear that the test is not a mere rational basis test. In *Turner*, this Court struck down a BOP regulation restricting prisoner marriages even though the government presented evidence demonstrating that prison officials could reasonably have believed, and in fact did believe, that the restriction served the objectives of security and rehabilitation. Prison officials testified in *Turner* that the regulation served security concerns because prisoner marriages would result in "love triangles" that might lead to violent confrontations between inmates, and that it served rehabilitation concerns because women prisoners needed to develop skills of self-reliance that would be undercut by marriage. *Turner*, 482 U.S. at 98-99. The Court nonetheless struck down the restriction because "*[o]n this record* . . . the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives." *Id.* at 99 (emphasis added). As the dissent below recognized, the *Turner* Court's repeated qualification of its conclusion "starkly suggests that while a reasonable relationship might possibly have been demonstrated between the marriage restriction and the interests asserted, the prison had failed to present sufficient evidence to establish that relationship." Pet. App. 34a-35a (Wald, J., dissenting).

The remaining three prongs of *Turner* require reviewing courts to scrutinize the regulation at issue to determine whether it is an exaggerated response to the legitimate governmental interest the regulation purports to advance. This inquiry tests, in part, the degree of "fit" between the government's interest and the action it has taken. Although this is plainly not a least restrictive alternative test, it does require a reasonably close nexus between the government's interest and the infringement of prisoners' constitutional rights. Thus, even if a regulation does bear a relationship to a legitimate, neutral government interest, that regulation is nonetheless unconstitutional if it sweeps too broadly. The question of whether the challenged regulation is a reasonable response to the governmental interest is answered by reference to the remaining *Turner* factors, which ask whether alternative means of exercising the asserted right remain open to prison inmates; what impact the accommodation of the constitutional right will have on other prisoners, staff, and resources; and whether there are any ready alternatives that would allow the prisoner to exercise his rights at a minimal cost to the institution. *Turner* at 89-91.

The majority, however, expressly found that the question of whether there is, *in fact*, a reasonable fit between the flat ban on receipt of all sexually oriented material to *all* prisoners and an interest in rehabilitation is irrelevant under *Turner*. "The question is not," the majority concluded, "whether curtailment of pictorial smut will advance the prisons' rehabilitative project, but whether Congress could reasonably have believed that it would do so." Pet. App. 23a. Thus, the majority held that even if the flat ban on access to sexual material was an exaggerated response to the government's rehabilitative concerns, the regulation must be upheld as long as Congress *could reasonably have believed* that it was an appropriate response.[9] In doing so, the majority expressly reduced not just the first prong of *Turner* but the entire *Turner* test to mere rational basis review.[10]

The majority's interpretation of the remaining three *Turner* inquiries eviscerates this Court's carefully balanced test, and is in irreconcilable conflict with that of other circuits which have concluded that *Turner* requires the government to produce evidence that demonstrates that the scope of the intrusion onto constitutional rights is reasonably necessary to further the governmental interest asserted. *See, e.g. Shimer v. Washington*, 100 F.3d at 510 (remanding to develop the record on whether a prohibition against staff recommendations of prisoners to a review board was reasonably related to government's asserted concerns in security and corruption prevention); *Ward v. Walsh*, 1 F.3d 873, 879 (9th Cir. 1993) (remanding for factfinding under the additional *Turner* prongs to assess whether the government's refusal to provide kosher diets was sufficiently related to the asserted interest in efficiency); *Frazier v. Dubois*, 922 F.2d 560, 563 (10th Cir. 1990) (remanding for factfinding on alleged retaliatory prisoner transfer); *Ali v. Dixon*, 912 F.2d 86, 91 (4th Cir. 1990) (remanding for factual development of administrative impact of adding prisoner's religious name to institutional records). As these courts have recognized, the final three *Turner* prongs require courts to answer a factual question relating to the degree of fit between the regulation and the government interest.[11]

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[9] Nor did the majority weigh the strength of the right at issue -- here the fundamental First Amendment right to receive expressive material -- against the strength of the asserted interest -- here an amorphous and undefined interest in rehabilitation.

[10] Even the government was unwilling to argue that the entire *Turner* test was synonymous with rational basis review. *See* Reply Brief, No. 97-5293 at 7-8 (D.C. Cir. filed April 2, 1998) (arguing that plaintiffs "stat[e] incorrectly that we claim the *overall* standard under *Thornburgh* is rational basis. . . . The overall standard in *Thornburgh*, taking into account all four factors, is "reasonable relationship," but the first factor alone . . . calls for rational-basis-style review").

Because the majority determined that the entire Ensign Amendment should be subjected to mere rational basis review, it did not make the factual inquiry these courts have concluded *Turner* requires. Indeed, the majority made no factual inquiry at all into whether the complete ban on *all* prisoners' receipt of *all* expressive material that features nudity is an exaggerated response to the government's purported interest in rehabilitation. Other than generalized statements describing the majority's view that pornography may thwart character growth generally,[12] the majority made no attempt to link the receipt of adult material and the possible recidivism of the prisoners in the federal prison system, nor did the majority address the fact that the vast majority of prisoners affected by the Ensign Amendment's ban are incarcerated for crimes, such as drug offenses, that bear no possible relationship to adult material.[13] Thus, although it cannot seriously be argued that the rehabilitation of drug offenders, armed robbers, or arsonists would be deterred by their access to magazines containing mere nudity, the majority made *no* serious attempt to address whether the Ensign Amendment "sweeps . . . more broadly than is necessary." *Turner*, 482 U.S. at 80.[14]

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[11] Courts have not been uniform, however, in their interpretation of the precise degree of fit required, or on the question of whether it is the government or the prisoner-plaintiff that bears the burden of proof on this issue. *Compare Shimer v. Washington*, 100 F.3d at 509-10; *Walker v. Sumner*, 917 F.2d at 385; *Swift v. Lewis*, 901 F.2d 730, 731-32 (9th Cir. 1990) *with Giano v. Senkowski*, 54 F.3d 1050, 1054 (2d Cir. 1995); *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993).

[12] The majority concluded that "Congress might well perceive pornography as tending generally to thwart the character growth of its consumers," and that precluding prisoners from reading material they enjoy might teach them to "defer[] gratification . . . [and] join[] eros to agape." Pet. App. 14a. The majority acknowledged that it had no reason to conclude that the Ensign Amendment would have this impact, noting that "[t]he supposition that exclusion of pornography from prisons will have much of an impact in this direction may be optimistic." *Id.*

The majority's reduction of the last three *Turner* prongs to whether Congress *might* have thought that there was a reasonable fit between banning all sexually oriented material and rehabilitation, and its corresponding refusal to remand to allow plaintiffs to develop a factual record that would demonstrate that the ban sweeps too broadly thus conflicts with the approach adopted by other circuits, and with the Court's opinions in *Turner* and *Thornburgh*. In *Turner*, the Court analyzed a restriction on marriage that was purportedly designed to further security and rehabilitation interests. In particular, the government asserted that prison marriages might implicate "love triangles" that would lead to violent confrontations. With respect to rehabilitation, prison officials testified that many female prisoners were overly dependent and that this was connected to the crimes they committed. In the view of the testifying prison superintendent, these women prisoners needed to learn skills of self-reliance and the ban on marriage between prisoners furthered that goal.

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[13] Statistics published by the BOP indicate that only 2.6% of the prison population has been convicted of "violent offenses." *See* Quick Facts and Statistics, found at http:\\www.bop.gov (visited Oct. 29, 1998). Violent sexual offenses -- such as rape -- are not reported separately.

[14] Nor did the majority address the fact that *no* official from the BOP had ever suggested that a ban on prisoners' access to sexual material was necessary or even useful for the rehabilitation of any prisoner or class of prisoners. Although prison wardens could easily alter their regulations to allow the exclusion of specific material that they deemed harmful to the rehabilitation of a given prisoner or a class of prisoners, such as violent sex offenders, this fact went undiscussed. Nor did the majority address the fact that wardens historically have not, in their professional judgment, felt the need to exclude such material, but have instead routinely allowed into prisons the very material banned by the Ensign Amendment.

The Court did not find that the purported interest was illegitimate, or that there was no plausible connection between the interests asserted and the challenged regulation. Nonetheless, the regulation was struck down because the government had not *demonstrated* that there was a sufficiently close nexus between the regulation and the government's interests. The regulation "represents an exaggerated response to [the asserted] security objectives," the Court found, because the warden could impose a ban on only those marriages that present a threat to the security or order of the institution. *Turner*, 482 U.S. at 97-98. The Court also found that "on this record," the marriage restriction was not "reasonably related to the articulated rehabilitation goal." *Id.* Although officials had testified that certain marriages negatively impacted prisoners' rehabilitation, "[t]he proffered justification . . . does not explain the adoption of a rule banning" *all* marriages. *Id.* at 98-99. Because "the rule sweeps much more broadly than can be explained by petitioners' penological objectives," the Court struck down the regulation. *Id.*

In *Thornburgh*, the Court upheld a regulation that affected prisoners' speech *because* the restriction was sufficiently tailored to the governmental interest in security. In sharp contrast to the Ensign Amendment, *Thornburgh* did not involve a flat ban on an entire category of speech, but instead required wardens to make case-by-case determinations about a given publications' potential impact on security and good order. The Court was "comforted by the individualized nature of the determinations required by the regulation," which helped ensure that only those publications posing a realistic threat to security were excluded. *Thornburgh*, 490 U.S. at 416. Moreover, the regulations did not allow the warden to delegate the power to reject publications, and prohibited the establishment of an "excluded list" of publications, safeguards the Court approvingly noted prevent "needless exclusions." *Id.* at 417.[15] Critically, the Court also remanded to the district court for "an examination of the validity of the regulations as applied to any of the 46 publications introduced at trial as to which there remains a live controversy." *Id.* at 419. That the *Turner* test requires courts to make a judgment about the *actual* fit between the regulation and the governmental interest is clear.

The test adopted by the majority, however, precludes reviewing courts from making the very inquiry *Turner* and *Thornburgh* demand. Because the majority concluded that the relevant question is not whether the prison regulation "will advance" the governmental interest, "but whether Congress could reasonably have believed that it would do so," the majority's formulation of the *Turner* test would require courts to blindly uphold any regulation that *might* plausibly have any connection to the asserted governmental interest. *Turner* does not allow, much less require, such a result.

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[15] In laying out the relevant legal test, the Court discussed the degree of fit required, noting that where "the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion, a closer fit between the regulation and the purpose it serves may safely be required." *Thornburgh*, 490 U.S. at 412.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Joseph AMATEL, et al., Appellees
v.
Janet RENO, Attorney General of the United States, et al., Appellants

Nos. 97-5293, 97-5294, 97-5295.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 8, 1998.

Decided Sept. 15, 1998.

Inmates and publishers brought suit, claiming that statute prohibiting Federal Bureau of Prisons (BOP) from using federal funds to "distribute or make available" to prisoners "commercially published information or material" known to be "sexually explicit or featuring nudity" violated First Amendment. The United States District Court for the District of Columbia, Sporkin, J., 975 F.Supp. 365, held that statute violated First Amendment. Appeal was taken. The Court of Appeals, Stephen F. Williams, Circuit Judge, held that: (1) rehabilitation of prisoners was legitimate and neutral goal supporting statute; (2) Congress could have rationally seen connection between rehabilitative goals and effect of distributing pornographic materials; (3) statute and regulations were reasonable, for First Amendment purposes; and (4) case would be remanded for consideration of whether statute was unconstitutionally vague.

Reversed and remanded.

Wald, Circuit Judge, dissented and filed opinion.

Edward Himmelfarb, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Frank W. Hunger, Assistant Attorney General, Wilma A. Lewis, U.S. Attorney, and Barbara L. Herwig, Assistant Director, U.S. Department of Justice.

Jodie L. Kelley argued the cause for appellees. With her on the brief were Ann M. Kappler, Marjorie Rifkin and Margaret Winter.

Bruce A. Taylor was on the brief for amici curiae National Coalition for the Protection of Children & Families, et al.

Before: WALD, WILLIAMS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILLIAMS.

Dissenting opinion filed by Circuit Judge WALD.

STEPHEN F. WILLIAMS, Circuit Judge:

A group of prisoners and publishers challenges the constitutionality of a statutory ban on the use of Bureau of Prisons funds to distribute sexually explicit material to prisoners. The statute is not enforced directly; instead, the Bureau has promulgated regulations defining the terms of the proscription and significantly narrowing its scope. The district court, analyzing the statute, ruled that it was facially invalid as a violation of the First Amendment and enjoined its enforcement. Finding that scrutiny should be directed to the substance of the regulations instead, and disagreeing with the district court's evaluation, we reverse and remand.

* * *

Before 1996, federal regulations authorized prison wardens to reject a publication "only if it [was] determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. § 540.71(b). Sexually explicit material fell into this category if it "by its nature or content pose[d] a threat to the security, good order, or discipline of the institution, or facilitate[d] criminal activity." 28 C.F.R. § 540.71(b)(7). Under this standard, explicit heterosexual material was ordinarily admitted. *See Thornburgh v. Abbott,* 490 U.S. 401, 405 n. 6, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).

In 1996 Congress passed the Ensign Amendment, which bars the use of Bureau of Prisons funds to pay for the distribution of commercial material that "is sexually explicit or features nudity." [1] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 § 614. [2] Regulations later adopted by the Bureau assign rather narrow meanings to these terms: "nudity" means "a pictorial depiction where genitalia or female breasts are exposed";

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[1] By its terms, the statute therefore does not prohibit prisoners from obtaining such material at their own expense. Neither party has suggested that this is a realistic possibility, or discussed the rules governing gifts by visitors. Accordingly, our analysis will treat the spending restriction as a ban on distribution. Where the government absolutely monopolizes the means of speech or controls a bottleneck, as we are assuming vis-a-vis the prison distribution system, a refusal to fund functions the same as an outright ban.

[2] Identical language appears in § 614 of Pub. L. No. 105-119, governing the fiscal year ending September 30, 1998, so no issue of mootness is currently posed.

"features" means that "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual onetime issues." Even material that otherwise would be said to "feature nudity" is excepted if it contains "nudity illustrative of medical, educational, or anthropological content." "Sexually explicit" means "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation." 28 C.F.R. § 540.72(b). Under these regulations, then, there is no restriction whatever on non-pictorial sexually explicit material.

In 1997, three inmates, each denied receipt of either *Playboy* or *Penthouse*, filed separate suits alleging that the Ensign Amendment violated the First Amendment. Their suits were consolidated, along with similar suits filed by the publishers of those magazines and a publishing trade organization; the consolidated plaintiffs moved for injunctive relief. The district court, purporting to apply the test set out in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), found the Ensign Amendment facially invalid-- implicitly granting plaintiffs' motion for summary judgment (which, in fact, they never made)--and permanently enjoined its enforcement. 975 F.Supp. 365, 370 (D.D.C.1997).

* * *

Both sides agree that *Safley* sets out the appropriate framework for reviewing government regulation of prisons. [3]

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[3] The claims of the publisher plaintiffs might seem to call for a different analysis, as they of course are not prisoners. *Thornburgh* makes clear, however, that *Safley's* reasonableness standard governs "regulations that affect[ ] rights of prisoners and outsiders." 490 U.S. at 410 n. 9, 109

But before beginning that analysis, we must note that our first difference with the district court is as to the proper object of judicial scrutiny.

Plaintiffs ask for relief against both the Ensign Amendment and its implementing regulations. The district court seemed to assume that the statute itself has been and will be applied to these plaintiffs; accordingly, it directed its analysis primarily towards the statute. Id. at 368-70. But there is no suggestion that any warden does or will apply the statute directly; so far as appears, all enforcement is mediated through the regulations.

Insofar as plaintiffs attack the proscriptions of the statute not embodied in the regulations, they effectively pursue a pre-enforcement challenge. Even in the First Amendment context, such a challenge presents a justiciable controversy only if the probability of enforcement is "real and substantial." *Salvation Army v. Dep't of Comm. Affairs*, 919 F.2d 183, 192 (3d Cir.1990); *see also Steffel v. Thompson*, 415 U.S. 452, 460, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In the statutory borderland beyond the implementing regulations (i.e., the statute's apparent ban on some non-pictorial material, its vaguer language, and its lack of any exception for medical or educational material), the prospect of enforcement appears completely insubstantial. It is as if the government had waived certain provisions of the law. And with such a waiver, as *Salvation Army* explicitly holds, there is no standing to challenge the waived provisions. See 919 F.2d at 192-93 ("[T]he district court should decline to provide an advisory opinion regarding the constitutionality of these

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S.Ct. 1874.

provisions."). See also *Forsyth County, Georgia v. Nationalist Movement,* 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (evaluation of facial challenge to statute must take into account construction by enforcing body). We therefore limit our focus to the substantive prohibitions of the regulations. [4]

* * *

Cases analyzing constitutional claims by those within governmental institutions such as prisons, public schools, the military, or the government workplace often open with the axiom that the boundaries of those institutions do not separate inhabitants from their constitutional rights. *See, e.g., Safley,* 482 U.S. at 84, 107 S.Ct. 2254 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) ("[I]t has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *General Media Communications, Inc. v. Cohen,* ("*GMC*") 131 F.3d 273, 276 (2d Cir. 1997) ("The Constitution does not, of course, stop at the gates of a military base."). This observation is invariably followed by the complementary principle that by their nature such environments must allow regulation more intrusive than what may lawfully apply to the general public. *See Safley*, 482 U.S. at 84-85, 107 S.Ct. 2254; *Connick*, 461 U.S. at 143, 103 S.Ct. 1684; *Tinker*, 393 U.S. at 507, 89 S.Ct. 733; *GMC*, 131 F.3d at 276. In these environments, the government is permitted to balance constitutional rights against institutional efficiency in ways it may not ordinarily do. [5] *See, e.g., Waters v. Churchill*, 511 U.S. 661, 675, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (describing governmental power to restrict speech in the name of efficiency); *Safley*, 482 U.S. at 88, 107 S.Ct. 2254 (noting balancing between First Amendment rights and governmental interests).

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[4] Our dissenting colleague relies on two recent decisions invalidating provisions that are more similar to the statute than to the regulatory intepretation established in this case. *Mauro v. Arpaio,* 147 F.3d 1137 (9th Cir. 1998); *Waterman v. Verniero,* 12 F.Supp.2d 378 (D.N.J. 1998). See Dissent at 203-204 n.1. Because we see the only ripe case before us as confined to the regulations, our case is plainly distinguishable.

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[5] This distinction is often phrased in terms of differential standards of review applicable to the government when it acts in roles other than sovereign. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). But it may be more apt to conceive of it as a distinction between government regulation of public discourse generally, and government regulation of speech within governmental institutions. See generally Robert Post, *Constitutional Domains* 199-268 (1995).

For the prison context, *Safley* directs courts to uphold a regulation, even one circumscribing constitutionally protected interests, so long as it "is reasonably related to legitimate penological interests." 482 U.S. at 89, 107 S.Ct. 2254. We are to assess the overall reasonableness of such restrictions with attention to four factors: first, whether the restriction bears a "valid, rational connection" to the "legitimate governmental interest put forward to justify it," such that the "asserted goal is [not] so remote as to render the policy arbitrary or irrational," *id.* at 89-90, 107 S.Ct. 2254; second, whether inmates retain alternative means of exercising the circumscribed right, *id.* at 90, 107 S.Ct. 2254; third, the costs that accommodating the right imposes on other inmates, guards, and prison resources generally, *id.*; and fourth, whether there are alternatives to the regulation that "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests," *id.* at 90-91, 107 S.Ct. 2254. Although the factors are intended as guides to a single reasonableness standard, see *id.* at 89, 107 S.Ct. 2254; see also *Thornburgh*, 490 U.S. at 414, 109 S.Ct. 1874 ("The Court in [Safley] identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry."), the first factor looms especially large. Its rationality inquiry tends to encompass the remaining factors, and some of its criteria are apparently necessary conditions. Nothing can save a regulation that promotes an illegitimate or non-neutral goal. *See Safley*, 482 U.S. at 90, 107 S.Ct. 2254.

In this case, both proponents in congressional debate, and the government in its briefs here, assert as the goal an interest in the rehabilitation of prisoners. See, e.g., 142 Cong. Rec. H8261 (daily ed. July 24, 1996) ("Congress should not be fueling the sexual appetites of offenders, especially those who have been convicted of despicable sex offenses against women and children. Magazines that portray and exploit sex acts have no place in the rehabilitative environment of prisons, nor should we pay Bureau of Prison[s] staff to distribute them.") (statement of Rep. Ensign); *id.* at H8262 ("The infamous serial killer Ted Bundy . . . stated before his death his belief that pornographic materials directly contributed to his violent crimes. While a number of factors determine whether a prisoner will become a law- abiding citizen upon release from prison, cutting prisoners off from their sexually explicit magazines will certainly do no harm.") (statement of Rep. Ensign). The next question is whether rehabilitation is a legitimate and "neutral" government interest within the meaning of *Safley*.

The legitimacy of the rehabilitative purpose appears indisputable. Indeed, the Supreme Court has often characterized rehabilitation as one of the primary goals of penal institutions. *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (describing rehabilitation as "valid penological objective[ ]"); *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (identifying "substantial government interests of security, order, and rehabilitation"). At least since the mid-19th century, it is hard to imagine a prison system that did not seek to reduce the likelihood that prisoners would again transgress society's norms. The inventors of the prison in New York and Pennsylvania framed its goals in these terms:

> The penitentiary, free of corruptions and dedicated to the proper training of the inmate, would inculcate the discipline that negligent parents, evil companions, taverns, houses of prostitution, theaters, and gambling halls had destroyed. Just as the criminal's environment had led him into crime, the institutional environment would lead him out of it.

David J. Rothman, *The Invention of the Asylum: Social*

Order and Disorder in the New Republic 82-83 (rev. ed.1990).

In turning to "neutrality," the district court looked at the statute itself, not the goal, and found it non-neutral. "[T]he Ensign Amendment is a content- based statute with a sole focus on the sexual nature of the publications it seeks to prohibit." 975 F.Supp. at 368. The conclusion is correct--the Ensign Amendment is formulated in terms of content. But we do not understand that characteristic to run afoul of *Safley's* neutrality requirement. Despite the apparent similarity in terms, "neutrality" in the *Safley* sense is quite different from the familiar First Amendment notion of "content- neutrality." The Court most recently explained in *Thornburgh* that "neutral" here means no more than that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." 490 U.S. at 415, 109 S.Ct. 1874 (quoting *Martinez*). There the Court found neutrality simply because in application of the regulations the prison administrators were to "draw distinctions between publications solely on the basis of their potential implications for prison security." *Id.* It pointed out that the regulations struck down in *Martinez*, in contrast, barred writings that "unduly complain[ed]" or "magnif [ied] grievances," or expressed "inflammatory" views, thus inviting the prison authorities " 'to apply their own personal prejudices and opinions as standards for prisoner mail censorship.' " 490 U.S. at 416 n. 14, 109 S.Ct. 1874 (quoting *Martinez*); see also *Martinez*, 416 U.S. at 415, 94 S.Ct. 1800 (striking down regulations because no legitimate interest at all was offered as justification). Thus the *Martinez* regulations were "decidedly not 'neutral' in the relevant sense." *Thornburgh*, 490 U.S. at 416 n. 14, 109 S.Ct. 1874.

The rehabilitative interest offered by the government here meets this rather thin neutrality requirement. The Court cannot have meant to insist upon neutrality in its classic First Amendment sense, as embodied, for example, in the dictum of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), that "[u]nder the First Amendment, there is no such thing as a false idea." In its role as an operator of prisons, the government surely does not lapse from the required neutrality if it bans "how-to" manuals on fraud and embezzlement ("Fraud for Dummies"). The idea that committing such crimes is not proper may not be "false" in the *Gertz* sense, but in the prison context the government may oppose it rather absolutely. This authority cannot be explained away on the theory that such a ban could withstand even the strictest scrutiny and that its validity therefore tells us nothing of the "neutrality" requirement; as voiced by the Court, the "neutrality" requirement is an absolute prerequisite. Accordingly, we think the Court's actual application of the requirement, with its focus on the existence of some legitimate goal and on assuring that rules are in fact not framed so as to advance illegitimate or unvetted goals, must control our understanding of its meaning.

That government power to inculcate values conflicts with the libertarian premises of the First Amendment is clear, but such power is well established. Even outside special governmental institutions, the state has some authority to become a player in the marketplace of ideas. It may commission advertising urging children to stay in school or off drugs; it can sponsor anti-violence campaigns. *See Regan v. Taxation with Representation*, 461 U.S. 540, 548-49, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983); see generally *Rust v. Sullivan*, 500 U.S. 173, 193, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way.").

And within its own institutions, government's power to pursue its legitimate goals is elevated: within reasonable limits, it may attach sanctions to or exclude speech that threatens its goals--even if those goals include promotion of particular values. That is the general lesson of cases such as *Waters*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (upholding dismissal of employee for speech that might have caused disruption); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (upholding suspension of student who used indecent language in assembly speech); and *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (upholding exclusion from military base of civilians who wished to distribute political literature).

Of course this does not mean by a long shot that every government institution can pursue any value. Our century has seen more than enough of governments trying to act as engineers of human souls. But inculcation of values cannot be characterized as a suppression of expression in every context. The Supreme Court has in fact taken the position that democratic society depends on inculcation of democratic values. *See, e.g., Ambach v. Norwick*, 441 U.S. 68, 76-77, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) (stating that public schools are important "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests"); *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873, (1954) ("[Public education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."). The generality of *Safley's* reasonableness test, and common sense as well, suggest that the flexibility open to the political branches must be at its apogee in institutions for the care and custody of those who have already transgressed society's norms. If "promoting respect for authority and traditional values" among schoolchildren is a legitimate interest of government and not inherently a form of speech suppression, *see Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) (plurality opinion), surely the same is true of promoting such a goal among criminals.

Prisoners of course differ from the other examples of individuals entangled with the government in that they have no recourse to a private sphere. For them, there is no outside. Judges plainly must bear in mind the total occupation of prisoners' lives by the state. But prisoners find themselves in the maw of the state not because they have been drawn there by the promise of government wages, nor because a statute imposes a universal requirement of education, but because they have broken the law. Moreover, even government workers have suffered a similar eclipse of the private sphere; the government's ability to fire them for speech that threatens workplace disruption is not limited to speech within the workplace. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (analyzing letter to the editor). See generally Note, The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State, 106 Yale L.J. 1233, 1239-40 (1997) (discussing scope of governmental authority). Accordingly, we conclude that rehabilitation, and such character- moulding as may be implicit therein, constitute legitimate and neutral goals as those are understood in *Safley*.

* * *

We thus turn to whether there is a "valid rational connection" between the interest and the regulations. Prison jurisprudence is not well enough developed to indicate precisely how demanding the requirement of rational means-end connection is. But the similarity between *Safley's* phrasing and the language of rational basis review suggests to us that, as far as the means-end fit is concerned, Safley's standard is, if not identical, something very similar. Compare, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) ("[T]he relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.") with *Safley*, 482 U.S. at 89-90, 107 S.Ct. 2254 ("[T]he logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.").

The legislative judgment is that pornography adversely affects rehabilitation. It does not matter whether we agree with the legislature, only whether we find its judgment rational. The question for us is not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would. *See, e.g., Nordlinger*, 505 U.S. at 11, 112 S.Ct. 2326.

We think that the government could rationally have seen a connection between pornography and rehabilitative values. Congress might well perceive pornography as tending generally to thwart the character growth of its consumers. One current exposition of this view sees pornography as treating women purely as objects of male sexual gratification. *See, e.g.*, Catharine A. MacKinnon, *Only Words* 108-10; MacKinnon, "Francis Biddle's Sister: Pornography, Civil Rights, and Speech," in *Feminism Unmodified* 163, 174

(1987); Martha C. Nussbaum, "Objectification," 25 *Phil. & Pub. Affairs* 249, 283-86 (1995); Cass Sunstein, *The Partial Constitution* 257-90 (1993). But this viewpoint shares at least a core with ideas that have a lineage of a few centuries, perhaps millennia, stressing the desirability of deferring gratification, of sublimation of sexual impulses, of channeling sexual expression into long-term relationships of caring and affection, of joining eros to agape. The supposition that exclusion of pornography from prisons will have much of an impact in this direction may be optimistic, but it is not irrational.

There is, of course, no "record evidence," and certainly no sophisticated multiple regression analyses or other social science data, to support this belief--a fact our dissenting colleague finds fatal. See Dissent at 207-08. We do not think, however, that common sense must be the mere handmaiden of social science data or expert testimonials in evaluating congressional judgments. Quite the opposite: scientific studies can have a corrective effect by establishing an apparently implausible connection or refuting an apparently obvious one, but, subject to such corrections, conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality. Compare D.N. McCloskey, *The Rhetoric of Economics* 44 (1985) ("Not all regression analyses are more persuasive than all moral arguments; not all controlled experiments are more persuasive than all introspections. People should not discriminate against propositions on the basis of epistemological origin. There are some subjective, soft, vague propositions that are more persuasive than some objective, hard, precise propositions."). Nor do we think *Safley* requires more. In that case, the Court scoured the record for evidence of a rational link between the asserted security interests and the marriage ban because common sense does not suggest any. See *Safley*, 482 U.S. at 97-100, 107 S.Ct. 2254. Here, the regulations restrict prison consumption of publications that implicitly elevate the value of the viewer's immediate sexual gratification over the values of respect and consideration for others. Common sense tells us that prisoners are more likely to develop the now-missing self-control and respect for others if prevented from poring over pictures that are themselves degrading and disrespectful.

Nor can we find irrationality in a congressional fear that pornography may set back rehabilitation in the narrower sense, more directly related to recidivist activity. The briefs, particularly that of the amicus curiae, call our attention to studies purporting either to document or to demolish the causal link between pornography and sex crimes.[6] Without attempting a comprehensive summary, we note a few. One concludes that exposing "already angered men" (probably not especially rare in prison) to nonviolent pornography can lead to short-term increases in their aggressiveness. Edward Donnerstein, *et al.*, *The Question of Pornography* 40-48 (1987). Another finds that "pornography provides ideational support for rape...." Larry Baron & Murray A. Straus, *Four Theories of Rape in American Society* 185 (1989). Baron & Straus's primary evidence for this claim is an observed correlation between the circulation rates of sex magazines and reported rape rates. While they are hesitant to defend a

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[6] Congress did not cite these materials, an omission of no importance. *See Jones v. United States*, 463 U.S. 354, 365 n. 13, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983). Our concern is not why Congress believed that pornography affected rehabilitation, but whether it would have been rational so to believe. *Cf. Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 1197, 137 L.Ed.2d 369 (1997) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.").

"cause-effect" link between pornography and rape, they do see the correlation as explained by "the presence of a hypermasculine or macho culture pattern." *Id.* at 186. This cultural pattern, Baron and Straus hypothesize, causes both higher incidence of rape and higher consumption of pornography. Of course, it seems quite likely that a culture and its manifestations have a mutually reinforcing relationship, so that a prohibition of pornography is a reasonable element of a struggle against machismo and its ill effects.

Finally, there is a significant body of research showing that long-term exposure to pornography, particularly pornography containing scenes of "aggressive sexuality," can make its (male) audience more aggressive, more tolerant of violence against women, and more susceptible to myths about rape, such as the notion that women can enjoy being raped. See Neil Malamuth, "Aggression against Women: Cultural and Individual Causes," in Malamuth & Donnerstein, 19, 32-39; see also Mike Allen *et al.*, "Exposure to Pornography and Acceptance of Rape Myths," 45 J. Communication 5 (1995) ("Although the experimental studies demonstrate that violent pornography has more effect [inducing rape myth acceptance] than nonviolent pornography, nonviolent pornography still demonstrates an effect.") See also Richard A. Posner, *Sex and Reason*, 366-71 (1992) (noting inconclusiveness of social science findings on net effects of pornography on incidence of rape; pornography may tend to increase rape by its ideological and aphrodisiac effects, but may tend to decrease it by enhancing a substitute (masturbation), the balance of these effects being unknown).

The point of this is not to suggest that a causal link has been shown. The array of academic authority on the other side is at least as substantial, and quite possibly more so. But even undertaking to weigh the competing scholarship would misconceive the judicial role. Dealing with legislative judgments about rehabilitation, the Supreme Court has said that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices." *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974) (emphasis in original); *see also Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2081 n. 3, 138 L.Ed.2d 501 (1997). And in upholding a statute barring provision of sexually explicit material to minors, the Court noted that "while these studies all agree that a causal link [between exposure to explicit material and impaired ethical and moral development] has not been demonstrated, they are equally agreed that a causal link has not been disproved either." *Ginsberg v. New York*, 390 U.S. 629, 642, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (internal quotation omitted); see also *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 n. 3 (7th Cir. 1985). The same uncertainty prevails here, and suffices to place the legislative judgment within the realm of reason under the standards applicable to the political branches' management of prisons.

The evidence is simply not conclusive on the efficacy of a ban on pornography in promoting prisoners' rehabilitation. For judges seeking only a reasonable connection between legislative goals and actions, scientific indeterminacy is determinative.

* * *

The remaining *Safley* factors further substantiate the overall reasonableness of the regulations. The second involves the prisoners' alternative means of exercising the right at stake. Of course if the "right" at stake is defined in terms of the materials excluded by the ban, any regulation will come up short. The Court accordingly observed in *Thornburgh* that the relevant right "must be viewed sensibly and expansively," 490 U.S. at 417, 109 S.Ct. 1874, though it stated no method for actually carrying out the definitional process. In *Thornburgh*, where the regulation barred all "sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity," *id.* at 405 n. 5, 109 S.Ct. 1874, the Court found the second factor "clearly satisfied" because "the regulations [there at issue] permit a broad range of publications to be sent, received, and read," *id.* at 418, 109 S.Ct. 1874. In so doing, it made no inquiry into the scope of sexually explicit material not covered by the ban. Thus, unless there is some minimum entitlement to smut in prison, the origins of which must be obscure, this factor can hardly be fatal.[7]

The third *Safley* factor concerns the adverse impact "on guards and other inmates, and on the allocation of prison resources" of accommodating the right claimed. 482 U.S. at 90, 107 S.Ct. 2254. It thus seems in part a restatement of the deferential balancing called for under the first factor: if Congress may reasonably conclude that pornography increases the risk of prison rape, then the adverse impact is substantial. Accommodating the right poses a threat to the safety of guards and other inmates. The issue of the allocation of prison resources we take up below; we think the third and fourth factors are strongly interrelated.

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[7] Even if there were such a bizarre entitlement, the regulations would still satisfy this factor, as they leave the inmate free to enjoy all written forms of smut not barred by the regulations upheld in *Thornburgh*.

The fourth *Safley* factor poses the question whether there are alternatives that can accommodate that right "at de minimis costs to valid penological interests." *Safley*, 482 U.S. at 91, 107 S.Ct. 2254. This is not, the Court emphasized, a " 'least restrictive alternative' test." *Id.* at 90, 107 S.Ct. 2254. The most obvious alternative is a detailed prisoner-by-prisoner (and presumably publication-by-publication) sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner. The costs of this approach seem far from *de minimis*. Apart from the purely administrative burden of such a process, the exercise of such broad discretion seems highly conducive to just the sort of conflicting decisions that give bite to vagueness concerns. And the reality is that prisoners are likely to pass pornographic materials about, so that prisoner-by-prisoner determinations may run aground on the "ripple effect" that the Court mentioned in *Safley*, 482 U.S. at 90, 107 S.Ct. 2254. Even if pornography could be directed only to those not likely to be adversely affected, it could find its way to others, interfering with their rehabilitation and increasing threats to safety.

Of course the flip side of avoiding the costs and hazards of a grant of broad discretion to wardens is the possibility of preventing delivery of materials that, either generally or for a specific set of (effectively segregated) prisoners, pose little or no threat of the harm Congress sought to diminish. Outside prison walls this concern is addressed by the overbreadth doctrine. Here it seems to us captured in part by the demand for a rational relation between the regulation and the goal, and by consideration of alternatives under the fourth "factor." Thus, the objections to a more flexible standard--such as one that would vest discretion in wardens to prevent delivery of materials in any case where in his judgment it would impair a specific prisoner's rehabilitation--go a long way to rebut the claim.

The dissent, nonetheless, seems to regard only such a case-by-case approach as constitutional, and makes much of various hypothetical situations in which the categorical ban could unneccessarily exclude certain publications. See Dissent at 210-213. To the extent that these hypotheticals assume direct enforcement of the Ensign Amendment, the likelihood of such enforcement is, as we have noted, quite remote and not before us in this case. Further, the actions of the Bureau of Prisons also suggest that the likelihood of this sort of exclusion under the actual regulatory scheme is remote. The Bureau's Program Statement, for example, listing examples of permissible publications, cites National Geographic; Our Bod[ies], Our Selves; Sports Illustrated (Swimsuit Edition); and the Victoria's Secret Catalog. P.S. 5266.07, at 7. We find it all but impossible to believe that the Swimsuit Edition and Victoria's Secret pass muster while Michelangelo's David or concentration camp pictures fail; nor has there been any suggestion that any prison official has attempted to implement such a bizarre interpretation. As there is no allegation that women in segregated women's prisons are demanding *Playboy*, neither the possibility of such demand nor the Bureau's possible response assists plaintiffs in their overbreadth claim. [8]

Leaving aside these possible fringe applications of the regulation, we again note that the regulation by its terms only restricts pictures; a prisoner may *read* anything he pleases. The dissent's appeal to the value of ideas, pointing by way of example to the vistas opened for Malcolm X by his prison *reading*, see Dissent at 210-211, thus makes little sense here. Congress could, we think, reasonably be skeptical of the proposition that study of the pictures in *Penthouse* would help a prisoner become "an intelligent customer in the marketplace of ideas." If anything, the ban could strengthen the impact of literature by removing the distraction of pictures that in almost every case would be pornographic.

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[8] To the extent that the Dissent's insistence on individualized determinations turns on a view that general rules with any impact on First Amendment values must correspond to the underlying reason in *every* application, see, e.g., Dissent at 203 (suggesting that government must show that "any pictorial display of nudity or sexual activity communicates messages that are harmful to the rehabilitation of *all* prisoners") (emphasis in original), it asserts a burden that few general rules could satisfy.

In any event, even under conventional overbreadth doctrine outside of prison, overbreadth claims by those on the margins of pornography have fared poorly. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) ("Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.") And regardless of the type of speech at issue, narrow or improbable excesses of a statute are not a ground for invalidation before application shows their reality:

> [W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Even where a statute at its margins infringes on protected expression, "facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable. . . conduct . . . .'"

Osborne v. Ohio, 495 U.S. 103, 112, 110 S.Ct. 1691, 109

L.Ed.2d 98 (1990) (citations omitted) (ellipses in original). Accordingly, such problems of application can be left to the time when, if ever, they arise.

We find that the statute and regulation satisfy *Safley's* demand for reasonableness, scoring adequately on all four factors.

* * *

Plaintiffs argue that if we are unpersuaded by the district court's analysis we should remand the case to allow them to introduce evidence supporting their position. But that suggestion misconceives the legal issue under *Safley*. The question is not whether curtailment of pictorial smut *will* advance the prisons' rehabilitative project, but whether Congress could reasonably have believed that it would do so. The studies cited above, coupled with Congress's implicit appeal to ethical norms against the undue stimulation of carnal appetites, indicate the reasonableness of such a belief. If the Bureau of Prisons applies the regulations in a manner that would violate the *Safley* priciples, of course, that would be another case. Accordingly, the district court should have granted the defendants' motion to dismiss plaintiffs' complaint insofar as that complaint rested upon *Safley*.

* * *

Besides the overbreadth issue, which we have already addressed in the *Safley* context, plaintiffs have raised two additional theories--excessive vagueness and a claim that the regulations' distinction between pictorial and verbal works is content-based. In fact, the distinction between pictorial and verbal works seems more directed to form than to content, and in any event we have seen that *Safley's* neutrality requirement both displaces conventional First Amendment strictures on content-based limits and is satisfied by these regulations. Although *Safley* may well function as an all encompassing free speech test for the circulation of reading materials in prison, supplanting otherwise applicable First Amendment doctrine, it may be that plaintiffs' vagueness claim has independent force. If it did, of course, the role of the Bureau of Prisons, as manager rather than as law enforcer, might well play an important role in resolution of the claim. Accordingly, as the district court has not addressed these vagueness issues, we remand the case for it to do so. In the meantime, we lift the permanent injunction that it has imposed on enforcement of the regulations.

So *ordered*.

Wald, Circuit Judge, dissenting:

The prohibition to all federal prisoners of publications "featuring nudity" or depicting "sexually explicit" activities indisputably raises First Amendment concerns. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, ----, 117 S.Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment.") (internal quotation omitted); *Martin v. Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (noting that the right of freedom of speech "necessarily protects the right to receive [publications]"). Indeed, if the First Amendment, at its core, is designed to promote the free exchange of ideas, the debate in this case goes to the very heart of its protections. The government argues that the reason all publications featuring nudity or sexually explicit material, whether or not they are pornographic or obscene, should be withheld from *all* federal prisoners is that any pictorial display of nudity or sexual activity communicates messages that are harmful to the rehabilitation of *all* prisoners. Relying on what it claims to be the inherent reasonableness of a legislative judgment that such materials are always inimical to rehabilitation, the government throughout this case has steadfastly resisted creating any kind of record to support such a wide-reaching incursion on the constitutional rights of incarcerated individuals. Today, the majority unquestioningly endorses the government's approach. Because I believe this result sets an unwise and arbitrary precedent that runs contrary to prior case law, I respectfully dissent.[9]

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[9] I find it very significant that two of our sister courts have recently reached results opposite from that set forth by the majority today. In *Mauro v. Arpaio*, 147 F.3d 1137 (9th Cir. 1998), the Ninth Circuit invalidated a county prison system's ban on the possession of all materials containing "any graphic representation of frontal nudity." Although the county claimed that its interests in safety, the rehabilitation of inmates, and the reduction of sexual harassment of guards supported such a ban, the court held that the county had not "carried its burden to show that such a far reaching prohibition is 'reasonably related' to legitimate penological interests"; in particular, it had "offer[ed] no proof or reasoned explanation" for the ban. *Id.* 147 F.3d at 1142-44. And in *Waterman v. Verniero*, 12 F.Supp.2d 378 (D.N.J. 1998), a district court invalidated a state statute prohibiting inmates in a specialized facility for sex offenders from possessing or obtaining "sexually oriented materials" (defined as any description or depiction of "sexual activity or associated anatomical area"; see *Waterman v. Verniero*, 12 F.Supp.2d at 368 (D.N.J. 1998) (preliminary injunction)). Despite the state's claim that such materials would disrupt the rehabilitation of sex offenders at the institution, the court held that the state legislature that enacted the ban was motivated by public outrage over pedophiliac crimes rather than rehabilitative interests. *Waterman*, 12 F.Supp.2d at 381-82. Moreover, the court noted, the literature on the effects of such publications was too unsettled to support a finding that a rational relationship existed between the ban and rehabilitative interests. *Id.* In both cases, the courts found the broad scope of the ban, in particular its application to publications featuring nudity, to be unjustifiable in light of any evidence advanced by the government to support it.

It appears to need restating once again that prisoners do not lose all their constitutional rights when the prison door clangs behind them. While the prison gate may serve to isolate those inside from the outside world, it does not, as the Supreme Court has taken pains to emphasize, "form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Although the majority pays lip service to this canon, it ignores an important corollary: Whatever sentiments we might hold regarding prisoners for the crimes they have committed, these sentiments must not infect our determination of the prisoners' constitutional rights. Indeed, the Supreme Court has recently reaffirmed, albeit in a different context, that " 'a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' " *Romer v. Evans*, 517 U.S. 620, 634, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)) (invalidating state constitutional amendment prohibiting official action designed to protect homosexual persons from discrimination). So long as prisoners retain constitutional rights, including First Amendment rights, see *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) ("Inmates clearly retain protections afforded by the First Amendment . . . ."), our duty is to ensure that these rights are not impermissibly curtailed.[10]

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[10] As our Chief Judge has previously noted:

> the special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so "discrete and insular," so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority. Federal courts have a special responsibility to ensure that the members of such defenseless

It is equally true, however, that the unique and difficult task of running a prison will often necessitate some incursion on inmates' constitutional rights. A prisoner's desire to leave the prison once a week to attend religious services, for example, or his desire to correspond with other inmates may conflict with the prison's need to maintain institutional security. In these instances, courts must give a large measure of deference to the prison administrators who are actively involved in the daily operations of the institution. Courts are not in the best position to judge when or in what manner certain institutional interests may require some action on the part of prison officials to respond to the "complex and intractable" problems of prison administration. *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). Most of these problems, as the Supreme Court reminds us, "require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.*

As the majority has duly noted, the Court's standard in *Safley* recognizes the need to forge a balance between the competing interests of prison administration and prisoners' constitutional rights. As I read this standard, it embraces two principles. First, fundamental rights of prisoners must give way to governmental concerns more readily than the fundamental rights of nonprisoners. In adopting a test "less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights," *O'Lone*,

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groups are not deprived of their constitutional rights.

Doe v. District of Columbia, 701 F.2d 948, 960 n. 14 (D.C.Cir.1983) (separate statement of Edwards, J.).

482 U.S. at 349, 107 S.Ct. 2400, the Court intended to ensure that "courts afford appropriate deference to prison officials," id. To require that prison regulations infringing upon fundamental rights undergo strict scrutiny, as they would outside the prison context, would place an inordinately high obstacle in the way of prison administrators' attempts to run their institution safely and efficiently. Second, and significantly, the Court did not intend *Safley 's* lesser standard of review to negate prisoners' constitutional rights altogether, as the majority seems to suggest. The Court did not say, for example, that prison regulations are valid if there is any conceivable basis for their existence, as rational basis review is typically formulated. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (noting that where, under rational basis review, "there are plausible reasons for Congress' action, our inquiry is at an end"). Rather, the task for courts is to determine, while giving appropriate deference to the judgment of prison officials, whether a challenged regulation is, in fact, reasonable or whether it is an "exaggerated response" to the "legitimate governmental interest *put forward to justify it.* " *Safley*, 482 U.S. at 89-90, 107 S.Ct. 2254 (emphasis added); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1445 n.21 (2d ed. 1988) ("Any limit placed on the Court's imagination vis-a-vis legislative purpose must be recognized as a tightened form of scrutiny."). A governmental institution is permitted "regulation more intrusive than what may lawfully apply to the general public," Majority Opinion ("Maj.Op.") at 196, not simply because of its status but rather because of the identifiable, and unique, needs of that institution. And although the need for flexibility is perhaps at its highest in the prison environment, the need for limits on that flexibility is also paramount: Unlike government employees, students, or other participants in governmental institutions, prisoners have

no choice about whether to be subject to the power of the state.

To read *Safley*--as the majority appears to--as permitting unblinking deference to any "plausible" legislative judgment about the "rehabilitative" benefits of denying a prisoner's most fundamental constitutional right, *i.e.*, her freedom to read, renders any and all prisoners' constitutional rights a nullity. I had thought it went without saying that courts do not rely on the mere assertion of a regulation's drafters that the regulation is reasonable; to do so would amount to an abdication of our judicial role. *See, e.g.*, *Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8th Cir.1990) ("We would misconstrue [*Thornburgh*, *O'Lone*, and *Safley*] if we deferred not only to the choices between reasonable policies made by prison officials but to their justifications for the policies as well."); *Campbell v. Miller*, 787 F.2d 217, 227 n.17 (7th Cir. 1986) ("[D]eference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute."). Nor can the judicial role be diminished to the disappearing point solely because the original decisionmaking body in this case is Congress itself rather than the Bureau of Prisons ("BOP"). *Cf. Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment."). [11]

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[11] Of course, because the majority concludes that the BOP's regulations, and not the Ensign Amendment, are controlling in this case, the majority's focus on Congress's conclusions may be misguided. *See, e.g.*, Maj. Op. at

The *Safley* standard reconciles prisoners' constitutional rights with institutional needs and defers to prison administrators as the most appropriate articulators of those needs; so long as Congress acts with those same needs in mind, it is entitled to the same deference. But were we simply to defer to Congress's assertion that the Ensign Amendment ("the Amendment") was reasonably related to the interest asserted, there would be no need for judicial review at all, for no statute infringing on inmates' constitutional rights would fail to satisfy this test. The Court has reminded us that the *Safley* standard "is not toothless," *Thornburgh*, 490 U.S. at 414, 109 S.Ct. 1874 (internal quotation omitted); more precisely, it is not a license for lawmakers, any more than prison wardens, to shortchange the constitutional rights that the Supreme Court has insisted prisoners continue to possess. Only if our assessment is not a cursory one can we give adequate weight to *both* concerns that underlie the *Safley* standard. See, e.g., *Salaam*, 905 F.2d at 1171 n. 6 ("Reasonableness in this context refers not only to the relation between the goals of a regulation and its means, but also to the balance struck between the needs of the prison administrators and the constitutional rights of prisoners.").

It is crucial, therefore, to ensure that although the strictness of our review is lessened, it is not eliminated altogether. Our task, ultimately, is to assess the fit between the interest proffered and the remedy adopted-- whether the regulation under consideration is a reasonable means of addressing the legitimate penological interest put forward by the government. In *Safley* itself, for example, although the prison's asserted interests in security and rehabilitation were

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199 ("It does not matter whether we agree with the legislature, only whether we find its judgment rational."). But see note 4, *infra*.

sufficient to justify *some* restriction on the right to marry, the Court held that the particular restriction adopted was too broad to be upheld. *See Safley*, 482 U.S. at 97-98, 107 S.Ct. 2254 ("No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an exaggerated response to such security objectives."); *id.* at 98, 107 S.Ct. 2254 ("[I]n requiring refusal of permission absent a finding of a compelling reason to allow the marriage, the rule sweeps much more broadly than can be explained by petitioners' penological objectives."). In *Thornburgh*, by contrast, the pre-Amendment version of the restrictions under consideration here were found to represent a reasonable response to institutional concerns because the "individualized nature" of the determinations ensured that the policy would not result in "needless exclusions." *Thornburgh*, 490 U.S. at 416-17, 109 S.Ct. 1874; see also *id.* (noting that even a publication that met one of the criteria for exclusion would be rejected "only if it is determined to meet that standard under the conditions prevailing at the institution at the time"). These cases illustrate that the standard of review established by *Safley* sets some limits on the means the government may use to further penological interests. Although these limits are flexible, they are by no means as vaporous as the majority rules them to be.

I agree that rehabilitation is, conceptually, a legitimate governmental interest, even if no one is sure how to achieve it and the Federal Sentencing Guidelines have abandoned it as an attainable goal. *Compare Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) ("[S]ince most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody.") *and Dawson v. Scurr*, 986

F.2d 257, 260 (8th Cir. 1993) (noting that rehabilitation is a "legitimate objective") with *Kerr v. Puckett*, 138 F.3d 321, 324 (7th Cir. 1998) ("Congress abandoned 'rehabilitation' as a justification of imprisonment when it enacted the Sentencing Reform Act of 1984.") and S. Rep. No. 98-225 (1983), at 38, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 ("[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."). Where the majority and I part company is on the ultimate question: Has any "valid, rational connection" between the extremely broad ban on publications featuring nudity or explicit sexual activity and rehabilitation been shown in this case? And while I certainly do not discount the possibility that a ban more narrowly targeted on certain kinds of violent pornography or even on certain types of prisoners might satisfy this requirement, I cannot conclude, on the present record, that these regulations implementing the Amendment pass muster.[12]

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[12] The majority characterizes Amatel's attack on the Amendment itself as a "pre-enforcement challenge" that is invalid because, in promulgating implementing regulations, the government has "waived certain provisions of the law." Maj. Op. at 195, citing *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 192 (3d Cir.1990). In contrast to Salvation Army, however, we have no "express assurance" that the BOP will not enforce the breadth of the Amendment, *cf. Salvation Army*, 919 F.2d at 192; indeed, the regulations state simply that "publications containing nudity illustrative of medical, educational, or anthropological content may be excluded" from the definition of "features," *see* 28 C.F.R. § 540.72(b)(3) (1997) (emphasis added). Moreover, at oral argument, counsel for the BOP acknowledged that under the current regulations, wardens retain considerable discretion as to whether a publication "features" nudity. *See* Tr. of Oral Arg. at 6. The government's "waiver" of certain portions of the Amendment thus cannot be so blithely assumed and may in fact be an impermissible narrowing of the Amendment's mandate. *See, e.g.*,

I believe that the determination of whether a regulation (or statute) is reasonably related to a legitimate penological interest must depend, in all but the most obvious cases, on the evidentiary support for that nexus in the record before the court. Of course I recognize too that the question of what or how much evidence is necessary may depend on what logic or everyday experience show us to be the connection between the disputed means and the rehabilitative end. If the Amendment prohibited the distribution of publications containing escape plans, the connection between the ban and the penological interest in institutional security would be obvious, and we could uphold such a prohibition based on little or no demonstrated evidence. Where, as here, however, the connection (between nudity and rehabilitation) is far murkier, courts (and I would include legislators as well) far removed from the day-to-day operations of a prison are much less able to answer the question accurately on their own; indeed, the very reason that *Safley* prescribes a great measure of deference to prison administrators is that they are in the best position to provide answers involving means and ends in prison administration. *See, e.g., Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 713 (9th Cir. 1989) ("The principle that courts must provide wide latitude to prison policies needed to maintain institutional order and security necessarily presupposes that the administrators have crafted those policies with careful deliberation.") (citation omitted).

Public Citizen v. FTC, 869 F.2d 1541, 1557 (D.C.Cir. 1989) ("While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to secondguess Congress' calculations."); *Alabama Power Co. v. Costle*, 636 F.2d 323, 358 (D.C.Cir. 1979) ("Categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored.").

We would normally be expected to give a healthy dose of deference to the judgment of prison officials as to their experience and apprehensions in support of a regulation, but where, as in these regulations, these same officials were, so far as we can tell, never consulted on the Amendment's merits and under its terms are not allowed to exercise any judgment about what kinds of nudity or sexually explicit material are allowed inside the prison walls, I do not believe *Safley* permits us simply to assume the existence of evidence showing a connection between the regulation and a rehabilitative goal, as we might under rational-basis review and as the majority has in fact done here.

Safley itself provides a useful example of how too Spartan a record can doom a regulation. The Court's rejection of the marriage restriction at issue in that case clearly turned on the quality of the evidence before the Court; four times the Court concluded that the regulation was not reasonably related to penological interests based "on this record." *See Safley*, 482 U.S. at 97, 107 S.Ct. 2254 ("We conclude that *on this record*, the Missouri prison regulation, as written, is not reasonably related to these penological interests."); *id.* at 98, 107 S.Ct. 2254 ("Nor, *on this record*, is the marriage restriction reasonably related to the articulated rehabilitation goal."); *id.* at 99, 107 S.Ct. 2254 ("Moreover, although not necessary to the disposition of this case, we note that *on this record* the rehabilitative objective asserted to support the regulation itself is suspect."); *id.* ("*On this record*, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives.") (emphases added). This repeated qualification of the Court's negative conclusion about the validity of the regulation starkly suggests that while a reasonable relationship might possibly have been demonstrated between the marriage restriction and the interests asserted, the prison had failed to present sufficient evidence to establish that relationship.

The majority's apparent conclusion that the government bears no responsibility for compiling evidence to support the breadth of its ban--in other words, that the courts may simply hypothesize a rational connection--runs counter to the wisdom of several other circuit courts. *See, e.g.*, *Shimer v. Washington*, 100 F.3d 506, 509 (7th Cir. 1996) (prison administration "must proffer some evidence to support its restriction of ... constitutional rights" under *Safley* standard); *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995) (invalidating restrictions on contact visits with attorneys, noting that "defendants were unable to provide any evidence the restrictions on contact were reasonably related to prison security"); *Muhammad v. Pitcher*, 35 F.3d 1081, 1085 (6th Cir. 1994) (invalidating prison mail regulation because "there is no evidence in the record supporting Defendants' factual claim" that policy was reasonably related to interest in conserving resources); *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990) ("Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point."); *Waterman*, 12 F.Supp.2d at 373 ("To establish that a legitimate penological interest supports a statute, a state must provide evidence that the interest it proffered is the actual basis for the statute."); *Powell v. Riveland*, 991 F.Supp. 1249, 1254 (W.D. Wash. 1997) (upholding restriction on sexually explicit incoming mail where "[p]rior to implementing the policy, research was done on the effects of sexually explicit material and the policy/regulation was written to target those harmful materials"). In sum, it is clear, as Judge Posner has suggested, that the *Safley* analysis cannot be met simply on the basis of "pure conjecture." *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir.1988); *see also id.* ("[T]o suppose that the wearing of dreadlocks [as an expression of religious belief] would lead to racial violence is, on this record, the piling of conjecture upon conjecture. The potential infringement of the free-speech clause of the First Amendment is too plain to warrant comment."). *Safley* certainly does not stand for the proposition that Congress or prison officials may "set constitutional standards by fiat." *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989).

I might, therefore, have been able to go along--as the majority does here--with deferring to Congress had the government seen fit to proffer evidence that links a ban on the prohibited publications to rehabilitation or if the connection between that ban and rehabilitation was so self-evident that no further evidence was necessary to demonstrate its reasonableness. But neither event has occurred, and the majority's once-over-lightly of the scientific literature that does exist certainly does not accomplish the task, as the majority itself admits. *See* Maj. Op. at 200 ("The point of this is not to suggest that a causal link has been shown. The array of academic authority on the other side is at least as substantial, and quite possibly more so."). At best, it can be said that a few studies have shown a causative relationship between violent pornography and short-term increases in aggression--perhaps a helpful finding with regard to the security interests of prison authorities but next to useless in determining the effect on any long-term interest in rehabilitation.[13] In all other respects, the relationship between pornography and criminal activity is merely correlative,[14] and there is no evidence that simply viewing nonpornographic nudity or depictions of sexual activities (as opposed to pornography) has any effect at all.[15] *See, e.g.*, EDWARD DONNERSTEIN, DANIEL LINZ & STEVEN PENROD, THE QUESTION OF PORNOGRAPHY 177 (1987) (stating conclusion of Attorney General's Commission on Pornography that "in general, the scientific evidence shows no causal relationship between exposure to [nonviolent and nondegrading sexual] depictions and acts of sexual violence" and noting that the authors' "view of the scientific literature ... is in agreement with this conclusion"); *id.* at 40-48 (citing studies finding that exposing already angered men to nonviolent pornography can cause a short-term increase in their aggressive tendencies); Ernest D. Giglio, *Pornography in Denmark: A Public Policy Model for the United States? in 8*

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[13] Of course, the evidence to support a prison regulation need not be in the form of scholarly studies; affidavits from prison officials could also suffice as the basis for analysis. *See, e.g.*, *Safley*, 482 U.S. at 98, 107 S.Ct.

2254 (testimony of prison officials that they had experienced no problems with the marriages of male inmates relied on as evidence that ban was overbroad); *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir.1989) (finding prison regulation banning receipt of material espousing consensual sexual relationships between male adults and juvenile males to be reasonably related to rehabilitation based on affidavit from prison psychiatrist).

[14] Correlation cannot be sufficient to satisfy *Safley 's* requirement of a "valid, rational connection." Even if it could be shown, for example, that the majority of those who commit violent crimes are also avid Bible readers, this finding would not constitute a basis for prohibiting all prisoners from reading the Bible.

[15] By pornography, I mean "a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1767 (1976). There is, of course, much material that features nudity or depicts sexual activity that would not qualify as pornography under any definition, including many highly regarded works of art.

COMPARATIVE SOCIAL RESEARCH 281, 285 (Richard F. Tomasson ed., 1985) ("[A] positive causal relationship between pornography and sex crimes has not been documented by criminologists and psychologists."); Berl Kutchinsky, *Obscenity and Pornography: Behavioral Aspects, in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1077, 1083 (Sanford Kadish ed., 1983) (noting that the authoritative studies on the link between pornography and crime have concluded that there is apparently no causative relationship between nonviolent pornography and sex crimes). Indeed, it is unclear even in the studies finding a positive connection between violent pornography and aggressive behavior whether the aggression is due to the violent content of the material or its sexual content. *See, e.g.*, LARRY BARON & MURRAY A. STRAUS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY 8 (1989) ("It seems reasonable to conclude ... that it is the violent content rather than the sexual content that facilitates aggression."); RICHARD A. POSNER, SEX AND REASON 368 (1992) ("[T]he effects [of violent pornography] may be due to the violence per se rather than to the erotic component."). Thus, while it is entirely possible that a narrower publication ban than that accomplished by the Amendment could be supported by the available literature, *cf., e.g., Dawson*, 986 F.2d at 262 (upholding regulation limiting time, place, and conditions under which certain inmates could view materials), neither the government nor the majority has laid the barest foundation for the far-reaching ban promulgated. The majority's level of comfort in relying on any statement of any legislator as to what he thinks will encourage rehabilitation as the sole basis for taking away a First Amendment right is very surprising to me, especially since its holding today goes far beyond what any court has previously condoned in depriving prisoners of constitutional rights on the mere assertion of a legislator that he supposes rehabilitation to be so advanced.

In this respect, I believe that it needs to be stressed that the assertion of "rehabilitation" as the reason for impinging on prisoners' First Amendment rights is particularly disconcerting in its potential for abuse. Unlike its interest in institutional security, the contours of the government's interest in rehabilitation are quite amorphous and ill-defined. At the most basic level, the goal of rehabilitation might be stated as returning the prisoner to society in a state so that he will henceforth behave in a law- abiding manner, but no one, not even Congress, is so immodest as to claim secure knowledge of how this goal is to be achieved in individual cases, let alone in the aggregate; most often, rehabilitation efforts involve therapy, drug and alcohol counseling, basic education, or job training, but even in these positive attempts, the results are far from reassuring. Against that backdrop, it is extremely difficult, if not impossible, to ascertain precisely if or how a particular publication may work to frustrate the rehabilitative goals of prisoners. To start with, there is no consensus on whether in order to transform a law violator into a good citizen, he must be "remolded" attitudinally and instilled with desirable values or whether it is sufficient that he be convinced that further criminal activity would be counterproductive in his own case, whatever his vision of society or the world. Rehabilitation may also be viewed--in the majority's parlance--as an effort to direct the "character growth" of prisoners by limiting the reading materials to which he has access. *See* Maj. Op. at 198-199. But, whatever the rehabilitative vision, it should not be possible to proceed on some vague assertion of an interest in "rehabilitation" without the need to define the term or to show a connection between the proscribed activity and the chosen definition; to do so runs an overwhelming risk of overregulation and invasion of the innermost recesses of the human mind and spirit. Indeed, undertaking the Herculean task of "character-molding" is inherently problematic in its

First Amendment implications, for it presumably involves casting emerging prisoners in society's own image. This, of course, is the antithesis of First Amendment freedoms; indeed, "[t]otalitarian ideologies we profess to hate have styled as 'rehabilitation' the process of molding the unorthodox mind to the shape of prevailing dogma." *Sobell v. Reed*, 327 F. Supp. 1294, 1305 (S.D.N.Y. 1971); *cf., e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (noting "this Nation's repudiation of the principle that a State might so conduct its schools as to foster a homogeneous people") (internal quotation omitted). Under this theory, lawmakers who believe that books on Russian history may lead to disrespect for the United States may ban those books for prisoners; lawmakers who hold pro-life views may prevent prisoners from reading publications describing *Roe v. Wade*; and lawmakers who hold an antiquated view of the role women should play in society may ban the distribution in prisons of publications with feminist themes. Each of these actions could logically be taken in the name of rehabilitation, broadly defined, and each, without doubt, would contribute to a continual evisceration of the First Amendment rights of prisoners. *Cf., e.g., Stanley v. Georgia*, 394 U.S. 557, 565-66, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.... [I]t cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."); *McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir.1987) ("Given the strength of First Amendment protection for freedom of belief, prison authorities have no legitimate penological interest in excluding religious books from the prison library merely because they contain racist views.") (citation omitted); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir.1985), *aff'd mem.*, 475 U.S. 1001, 106 S.Ct.

1172, 89 L.Ed.2d 291 (1986) ("If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."). These examples may sound extreme--they are--but the majority's rationale easily encompasses them in its umbrella-like authorization for restricting prisoners' reading material on the basis of a minimum plausibility test for tying the censorship to some vague rehabilitation concept.

Even if the goal of rehabilitation is a more modest one--to convince the prisoner his own best interest lies in avoiding future crime--it is hard to see how that goal is furthered by returning him unequipped to be an intelligent customer in the marketplace of ideas. And while serious questions may well be raised about the value of some of the publications banned under the Amendment, there is much that falls under this broad ban that speaks intelligently to mankind, including prisoners: Michelangelo's *David*, for example, or grim photographs of naked bodies piled in the pits of Germany's concentration camps.[16] There is even a potential for such depictions of nudity to strike a life-changing chord with some prisoners, a change that should not be prevented from coming to fruition. Malcolm X wrote of his prison experience:

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[16] The majority suggests that the application of the regulations to prohibit artistic depictions of nudity or to documentary photographs of wartime atrocities would be "bizarre." *See* Maj. Op. at 201-202. But, in fact, even the regulations do not provide for any exceptions to the nudity ban based on a publication's artistic or political content. *See* 28 C.F.R. § 540.72(b)(3) (providing possible exception only for nudity "illustrative of medical, educational, or anthropological content"). And although the Victoria's Secret catalog and the Sports Illustrated Swimsuit Edition are listed by the BOP as permissible publications, the basis for their exclusion from the ban is left to conjecture. *Cf. id.* § 540.72(b)(2) (defining "nudity" as "a pictorial depiction where ... female breasts are exposed"). As for the notion that explicit descriptions of sexual activities and nudity are still permitted (an illustrated version of Henry Miller's *Tropic of Cancer* is banned but a nonillustrated version is not), this only underscores the arbitrariness of the rehabilitative nexus.

> I have often reflected upon the new vistas that reading opened to me. I knew right there in prison that reading had changed forever the course of my life. As I see it today, the ability to read awoke inside me some long dormant craving to be mentally alive.... My homemade education gave me, with every book that I read, a little bit more sensitivity to the deafness, dumbness, and blindness that was afflicting the black race in America.

ALEX HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 180 (1965).[17]

If rehabilitation is to be deemed a legitimate penological interest, the term must be given some shape, at least when it collides with fundamental liberties. Of course, as the majority notes, the Constitution has nothing to say about what messages the government may choose to communicate as a speaker. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 193, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way."). Congress or the BOP may make whatever recreational reading it wishes available in the prison libraries without offending the Constitution; they may even provide each prisoner with a tract on the harms of pornography in the hope that some readers will take its lessons to heart. But it is quite a different matter for prisons to deny all access to certain publications in the name of rehabilitation, particularly in such a broad and overreaching manner as this one. If prisoners are to retain any First Amendment rights, the mere assertion of "rehabilitation" as the interest to be served by a particular regulation cannot serve to extinguish those rights altogether.

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[17] Of course, lawmakers who believe that Malcolm X inspires separatism and racial consciousness may, under the "remolding" theory of rehabilitation, prohibit prisoners from reading his writings as well.

Because the Amendment and the regulations eliminate the discretion of prison wardens to make individual determinations about how particular publications will affect particular prisoners in particular prison settings, even rehabilitatively, I believe it was incumbent upon the government to point to some evidence demonstrating a connection between all publications that are sexually explicit or that feature nudity and a tendency to engage in criminal or disruptive behavior, keeping in mind that our task is to determine whether such a connection is reasonably likely to exist, not whether one might be conceivable. *Cf., e.g., Mauro*, 147 F.3d at 1142-44 (considering whether all materials depicting nudity are "reasonably likely" to cause violence or to be used to harass guards). Neither the government nor the majority has pointed to any such evidence.

Indeed, the proposition that all material that is sexually explicit or that features nudity will have a detrimental effect on rehabilitation is belied by the prior actions of the prison officials under the pre-Amendment policy. At that time, prison officials were authorized to prohibit sexually explicit materials that they believed would negatively affect the discipline or "good order" of the institution. Significantly, the prison officials--to whose expertise the Supreme Court has repeated deferred on matters such as this--did not choose to prohibit all material that is sexually explicit or that features nudity. Rather, they evaluated the publications individually to determine which ones, in their expert opinions, posed a potential threat and which did not; indeed, as the majority notes, "explicit heterosexual material" was ordinarily admitted. *See Thornburgh*, 490 U.S. at 405 n.6, 109 S.Ct. 1874 (quoting Program Statement 5266.5(b)(2)). It was this "individualized nature" of the determinations that led the *Thornburgh* Court to conclude that the regulations at issue in that case were rationally related to security interests, the nature of which, like rehabilitation, can change over time.[18] *See Thornburgh*, 490 U.S. at 417, 109 S.Ct. 1874 ("We agree that it is rational for the Bureau to exclude materials that ... are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.").

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[18] It should be noted in this respect that a seemingly innocuous publication may be quite detrimental to a prisoner's rehabilitation, depending on the circumstances. See, e.g., Waterman, 12 F.Supp.2d at 367-68, 368-69 (citing concerns of prison officials that pictures of children from the Sears catalog should not be seen by pedophile prisoners).

The need for individualistic determinations when behavior modification is at stake was also a concern in *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), in which the Court upheld a prison policy that permitted the involuntary administration of antipsychotic drugs to inmates, given that the policy was not unnecessarily broad and supported by a wealth of evidence:

> Its exclusive application is to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others. The drugs may be administered for no purpose other than treatment, and only under the direction of a licensed psychiatrist. There is considerable debate over the potential side effects of antipsychotic medications, but there is little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior. *Id.* at 226, 110 S.Ct. 1028.

Because I believe that, on this record, there is no basis for concluding that there is a rational connection between the interest asserted by the government--rehabilitation--and the restriction chosen to further that interest--a ban on the delivery to all federal prisoners of all publications that are sexually explicit or that feature nudity, I would affirm the decision of the district court. As the majority considers the remaining *Safley* factors, however, I will also offer a few thoughts.

The second *Safley* factor considers whether there are "alternative means of exercising the right that remain open to prison inmates." *Safley*, 482 U.S. at 90, 107 S.Ct. 2254. Although this right must be viewed "sensibly and expansively," *Thornburgh*, 490 U.S. at 417, 109 S.Ct. 1874, it cannot be viewed so broadly as to eliminate any reason for analysis (or as unhelpfully as the majority's sardonic reference to an "entitlement to smut"). The *Thornburgh* Court, for example, noted that although the regulation under consideration in that case permitted the warden to make individualized determinations as to each publication, an exercise of discretion that might appear to produce inconsistent results, "greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications," which "might itself run afoul of the second [*Safley*] factor." *Id.* at 417 n. 15, 109 S.Ct. 1874. Because the Amendment eliminates a wide variety of publications that feature nudity for artistic or other reasons, prisoners do not have sufficient means of exercising their right to receive many constitutionally protected materials. *Cf., e.g.*, *Mauro*, 147 F.3d at 1144 ("[I]n direct contradiction of the Supreme Court's cautionary language in *Thornburgh*, Maricopa County has enacted a regulation that sweeps too broadly, indiscriminately eliminating large categories of materials without individualized consideration.").

The third factor considers "the impact accommodation of the asserted constitutional right will have on guards and other inmates." Safley, 482 U.S. at 90, 107 S.Ct. 2254. Where the institutional interest asserted for a publication ban is security, accommodation of the inmate's First Amendment rights may indeed cause the "ripple effect" of which the *Safley* Court warned, *see id.*; a breach of security with respect to one prisoner is likely to result in other breaches in the prison. In this case, however, there is no evidence by which to judge whether permitting certain inmates to view publications that are sexually explicit or that feature nudity will have an adverse effect on the rehabilitation of other inmates. Rehabilitation is a gradual process, and it is entirely possible that any momentary lapses caused by the inadvertent receipt of an inappropriate publication may be reversed with additional rehabilitative efforts. This is not true of security breaches: Once an inmate has received information on how to escape from the prison, he cannot be made to forget it. It thus cannot be concluded, on this record, that accommodation of Amatel's First Amendment right will have a significant effect on the rehabilitation of other inmates.

Finally, the fourth factor considers whether there are "obvious, easy alternatives" that "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests"; if so, this may be evidence that the regulation is an "exaggerated response" to prison concerns. *Id.* at 90-91, 107 S.Ct. 2254. One such alternative comes immediately to mind: the preAmendment policy, under which wardens had discretion to examine each incoming publication and determine whether institutional interests favored its prohibition. The Court's approval of this policy in *Thornburgh* eliminates any concerns the majority might have that such a policy would be deemed arbitrary or particularly burdensome; indeed, since prison officials under the current policy must examine each publication to determine whether it is sexually explicit or features nudity, the prior policy arguably represents no additional administrative burden.

Moreover, other aspects of the Amendment suggest that it is indeed an "exaggerated response" to rehabilitative concerns. The Amendment does not allow the warden to take into account whether a prisoner is in a high- or low- security institution, whether a prisoner is male or female, what kinds of crimes the prisoner has committed,[19] the nature of the prisoner's sentence,[20] how long the prisoner has been incarcerated and how long he or she has left to serve, whether the prisoner is receiving rehabilitative treatment,[21] or even whether a prisoner is in a prison environment that provides an opportunity to share the material with anyone else (particularly with other prisoners convicted of sex crimes). In these respects, the Amendment "sweeps much more broadly than can be explained by [the government's] penological objectives." *Safley*, 482 U.S. at 98, 107 S.Ct. 2254 (invalidating ban on all prisoner marriages by noting that prison officials had experienced no problems with marriages by male inmates or with inmate civilian marriages; the prison's rehabilitative concern "appear[ed] from the record to have been centered almost exclusively on female inmates marrying other inmates or exfelons," *id.* at 99, 107 S.Ct. 2254, and thus did not account for the ban on other inmate marriages).

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[19] For example, the government has provided no evidence on why a ban on nudity is necessary to rehabilitate those convicted of nonsexual and/or nonviolent crimes. I can think of no reason why an embezzler, a tax evader, or a person held in contempt for refusing to testify will be rehabilitated if prevented from looking at publications that "feature" nudity. (The statements of the only two Members of Congress who offered floor comments on the Amendment suggest that their concern was with sex offenders. See 142 Cong. Rec. H8262 (daily ed. July 24, 1996) ("[I]f we do not adopt my amendment, we are sending the message that it is OK to provide sexually explicit magazines and books to the very prisoners who have committed violent acts against women.") (statement of Rep. Ensign); *id.* ("Far too often, those individuals convicted of crimes have the opportunity, while in prison, to use materials that glamorize the very acts for which they were convicted.") (statement of Rep. Christensen).)

Moreover, the Amendment's ban may also extend to those inmates who have not yet been convicted but rather are imprisoned while awaiting trial. The government has not suggested any reason for it to take a rehabilitative interest in these individuals, nor do I think it can legitimately do so. *See, e.g., McGinnis v. Royster*, 410 U.S. 263, 273, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973) ("[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.").

The majority's decision to remand this case for further consideration of Amatel's vagueness challenge leaves a scintilla of hope that this ill-conceived statute will ultimately fail. Because I cannot agree with the majority's *Safley* analysis, however, or with its decision to lift the district court's injunction in the interim, I respectfully dissent.

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[20] The government would seem to have less rehabilitative interest in, for example, prisoners who have been sentenced to life in prison without parole or to death.

[21] In some prisons, material featuring adult nudity is an effective part of a rehabilitative program. *See, e.g, Waterman*, 12 F.Supp.2d at 370-71 (citing evidence that adult pornography may be helpful in turning pedophiles away from child pornography).

CONCLUSION

Justice Holmes once remarked that hard cases make bad law. *See Northern Sec. Co. v. United States*, 193 U.S. 197, 400, 24 S.Ct. 436, 48 L.Ed. 679 (1904) (Holmes, J., dissenting). Claims of prisoners to read magazines like *Playboy* or *Penthouse* may not be the ideal vehicles for the articulation of First Amendment rights. But, as Dostoyevsky observed, "the degree of civilization in a society is revealed by entering its prisons." F. DOSTOYEVSKY, THE HOUSE OF THE DEAD 76 (C. Garnett trans., 1957). Today's ruling that prisoners may be stripped of rights to view publications of their choice on the mere assertion of legislators or regulators--far removed from the prison scene and without supporting evidence of any kind--that those publications will hinder their "rehabilitation" goes well beyond prior precedent and the case law in other circuits. It is a most troubling precedent.

APPENDIX B

Joseph AMATEL, et al., Plaintiffs,
v.
Janet RENO, et al., Defendants.

Civil Action Nos. 96-2774(SS), 96-2790(SS),
97-00475(SS).

United States District Court,
District of Columbia.

Aug. 12, 1997.

Inmates and publishers brought suit, claiming that statute prohibiting Federal Bureau of Prisons (BOP) from using federal funds to "distribute or make available" to prisoners "commercially published information or material" known to be "sexually explicit or featur[ing] nudity" violated First Amendment. On plaintiffs' motion for preliminary/ permanent injunction to prevent enforcement of statute, the District Court, Sporkin, J., held that statute violated First Amendment.

Permanent injunction granted.

Joseph Amatel, Pro Se, Marjorie Lynn Rifkin, Margaret Winter, Nat'l. Prison Project of the ACLU Foundation, Washington, DC, for Joseph Amatel.

Lee Alphonso Moore, Pro Se, Marjorie Lynn Rifkin, Margaret Winter, Nat'l. Prison Project of the ACLU Foundation, Ann Mary Kappler, Jenner & Block, for Lee Alphonso Moore.

Daniel J. Levitan, Pro Se.

Vincent Morgan Garvey, David Otto Buchholz, U.S. Dept. of Justice, Washington, DC, for Defendants.

MEMORANDUM OPINION

SPORKIN, District Judge.

These consolidated cases involve First Amendment challenges to Section 614 of the Omnibus Appropriations Act of 1997, Pub.L. No. 104-208, § 614, 110 Stat. 3009 (Sept. 30, 1996), which prohibits the Federal Bureau of Prisons ("BOP") from using federal funds to "distribute or make available" to prisoners "commercially published information or material" known to be "sexually explicit or featur[ing] nudity." This provision, which was introduced by Representative John Ensign, has come to be known as the "Ensign Amendment."

Plaintiffs Joseph Amatel, Lee Alphonso Moore, and Daniel J. Levitan ("prisoner Plaintiffs") are incarcerated in federal prisons. Since enactment of the Ensign Amendment, BOP staff have rejected several publications addressed to prisoner Plaintiffs. Plaintiffs Playboy Enterprises, Inc., General Media Communications and Periodical and Book Association of America, Inc. ("publisher Plaintiffs") publish or represent publishers of periodicals and other publications containing material that would be banned by the Ensign Amendment and its new implementing regulation. The publisher Plaintiffs have been notified that from now on their publications will not be delivered to inmates, and their publications will be routinely rejected by the BOP.

This matter is now before the Court on the Plaintiffs' motion for a preliminary/permanent injunction [1]to prevent enforcement of the Ensign Amendment, and Defendant's opposition thereto. The Court heard oral argument in this matter on June 25, 1997. For the reasons stated below, the Court finds that the Ensign Amendment, on its face, violates the First Amendment. Accordingly, the Court grants Plaintiffs' motion for permanent injunctive relief.

FACTUAL BACKGROUND

Federal prison authorities have long monitored and controlled the distribution of publications inside prison walls. Distribution of publications in federal prisons is controlled pursuant to regulations originally issued by the BOP in 1979 ("1979 regulations"). 28 C.F.R. § 540.71. The 1979 regulations give wardens the authority to keep prisoners from receiving publications only if the wardens determine that the material is "detrimental to the security, good order, or discipline of the institution or if [the publication] might facilitate criminal activity." 28 C.F.R. § 540.71(b). The regulations also specifically forbid the rejection of "a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant." *Id.*

The policy does not permit wardens to create a list of prohibited publications. Rather, each individual issue has to be reviewed by a warden prior to rejection. 28 C.F.R. § 540.71(c). While sexually explicit material can be rejected at a wardens discretion, the Program Statement expressly notes that sexually explicit heterosexual material will "ordinarily be admitted."[2] The Supreme Court upheld the constitutionality of the 1979 regulations in *Thornburgh v. Abbott*, 490 U.S.

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[1] Although Plaintiffs seek permanent injunctive relief in their complaint, their written motion only seeks a preliminary injunction. At the hearing on this matter, the parties agreed that on the record before it, if the Court found the statute facially unconstitutional, it could grant permanent injunctive relief.

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[2] The Program Statement to the 1979 regulations stated that:

> (a) A Warden may determine that sexually explicit material of the following types is to be excluded, as potentially detrimental to the security, good order, or discipline of the institution, or facilitating criminal activity:
> (1) Homosexual (of the same sex as the institution population)
> (2) Sado-masochistic
> (3) Bestiality
> (4) Involving children.
> (b) The following points should be emphasized:
> (1) It is the local Warden's decision (except for the child-model materials which are prohibited by law)--a sexually explicit homosexual publication for example may be admitted if it is determined not to pose a threat at the local institution;
> (2) Explicit heterosexual material will ordinarily be admitted;
> (3) Sexually explicit material does notnclude material of a news or information type--publications covering the activities of gay rights organizations or gay religious groups, for example, should be admitted;
> (4) Literary publications should not be excluded, solely because of homosexual themes or references, if they are not sexually explicit, and
> (5) Sexually explicit material may nonetheless be admitted if it has scholarly value, or general social or literary value.
> (c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

Program Statement No. 5266.07, *reprinted in Abbott v. Meese*, 824 F.2d 1166, 1177 (D.C.Cir.1987), *vac'd and remanded sub nom., Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).

401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).[3]

On September 30, 1996, President Clinton signed into law the Omnibus Budget Act of Fiscal Year 1997, P.L. 104-208, 110 Stat. 3009. Section 614 of the Act, known as the Ensign Amendment, states in its entirety:

> None of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity.

Pub.L. No. 104-208, § 614, 110 Stat. 3009 (Sept. 30, 1996).

The Ensign Amendment was enacted as an attachment to a comprehensive budgetary bill. No hearings were held by Congress in enacting the Ensign Amendments and no committee report was issued. No discussion of the statute appears in any Conference Report. The only statements made on the floor of the House regarding the Amendment reflect a desire on the part of the sponsors to keep sexually explicit material away from prisoners.[4] There is no record that any committee or the full Congress ever discussed how the banning of sexually explicit materials, in particular, will advance rehabilitative goals, or whether it is necessary to prevent distribution of such materials to all prisoners. Neither did Congress make any finding that rehabilitative goals were not being met by the 1979 regulations.

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[3] As in this case, the Plaintiffs in *Thornburgh* were both federal prisoners and publishers of material that had been banned under the challenged regulations. *Thornburgh, supra* at 403, 109 S.Ct. at 1876. The Court analyzed the publishers' rights under the same "reasonableness" standard as the prisoners's rights. *Id.* at 410 n. 9, 413-14, 109 S.Ct. at 1880 n. 9, 1881-82.

[4] Representative Christiansen stated that: "It is deplorable ... to think that America's Federal prisoners are granted access to vulgar, sexually explicit materials while serving time in our Federal prisons.... It is time to

On November 6, 1996, the Federal Bureau of Prisons ("BOP") issued an interim rule that enacted 28 C.F.R. § 540.72, a regulation implementing the Amendment. Despite the new regulation, the 1979 regulations still remain in place except where they are inconsistent with the Ensign Amendment. See 28 C.F.R. § 540.70.

The new regulation specifically enforces the Ensign Amendment, requiring wardens to reject for distribution to any prisoner any sexually explicit publication or publication that "features" nudity. 28 C.F.R. § 540.72. Section (b) of the regulation defines the operative terms:

> (1) "Commercially published information or material" means any book, booklet, pamphlet. magazine, periodical, newsletter, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items.
>
> (2) "Nudity" means a pictorial depiction where genitalia or female breasts are exposed.

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stop this ridiculous cycle of hypocrisy and end prisoner's access to sexually explicit materials. I believe this bill will make sure prisons are punishment, not playgrounds." See Cong. Rec. H8262 (July 24, 1996).

> (3) "Features" means the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition.
>
> (4) "Sexually explicit" means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation.

28 C.F.R. § 540.72(b). If the warden of an institution decides to reject a publication, the institution must give written notice to both the publisher or sender of the rejected materials, and the inmate-addressee. While an appeals process is provided for, the violative publications are sent back immediately. Inmates may not view the materials, even for the purpose of determining whether to appeal. 28 C.F.R. § 540.72(a).

LAW & ANALYSIS

As the Supreme Court held in *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989), the appropriate standard of review for a statute or regulation limiting distribution in prisons of incoming publications is the *Turner v. Safley* reasonableness test. Such statutes and regulations are "valid if [they are] reasonably related to legitimate penological interests." *Turner*, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987). In order to make this determination, the Supreme Court has "identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry." *Thornburgh*, 490 U.S. at 414, 109 S.Ct. at 1882. The first *Turner* factor, which must be satisfied, is whether "the governmental objective underlying the [statute or] regulations at issue is legitimate and neutral, and [whether] the [statute or] regulations are rationally related to their objective." *Id.* Only if the first factor is satisfied does the Court consider the other three factors: "whether there are alternative means of exercising the right that remain open to prison inmates," *id.* at 417, 109 S.Ct. at 1884; "the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison," *id.* at 418, 109 S.Ct. at 1884; and "the existence of obvious, easy alternatives." *Id.*

Legitimate penological interest

The legitimate penological interest posited by the Government for the Ensign Amendment and the interim rule is "rehabilitation" of prisoners, In *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224 (1974), the Supreme Court listed as "substantial" government interests, "security, order, and *rehabilitation*." *Martinez* was overruled in part by *Thornburgh, supra* at 413-14, 109 S.Ct. at 1881-82, holding that "strict scrutiny" analysis should not be applied to all prison regulations affecting First Amendment rights. Nonetheless, the *Thornburgh* decision did not have any bearing on the holding of the Court in *Martinez* that rehabilitation is a "substantial," and by extension. "legitimate" government penological interest. Accordingly, "rehabilitation" is a "legitimate" penological interest for the purpose of the *Turner* analysis.

Neutrality

Addressing the neutrality prong of *Turner*, the Court in Thornburgh found it to be a "close[ ]" question whether even the 1979 regulations were neutral. *Thornburgh, supra* at 415, 109 S.Ct. at 1882. The Court stated:

> On their face, the regulations distinguish between rejection of a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant" (prohibited) and rejection because the publication is detrimental to security (permitted). Both determinations turn, to some extent, on content.... [P]rison administrators draw distinctions between publications solely on the basis of their potential implications for prison security [and therefore] the regulations are "neutral" in the technical sense in which we meant and used the term in *Turner*.

Id. at 415-16, 109 S.Ct. at 1882-83 (internal citation omitted). Following this analysis, the question this Court must address is whether Congress in enacting the Ensign Amendment "dr[e]w distinctions between publications *solely* on the basis of their potential implications for [rehabilitation]." (emphasis added). In face of the legislative history behind the Ensign Amendment and the plain language of the Amendment, this Court concludes that distinctions on the basis of content were not drawn solely with a view to the implications for rehabilitation. Rather, the Ensign Amendment is a content-based statute with a sole focus on the sexual nature of the publications it seeks to prohibit.

The Ensign Amendment on its face does exactly what the 1979 regulations did not do: it restricts materials based solely on sexual content. Nothing in the statute or its history indicates any finding by Congress, or even belief on its part, that prohibition of sexually explicit materials or those featuring nudity would have further rehabilitative goals in a manner that prohibition of other materials would not.

Looking first to the legislative history, the sponsors could not have been more plain in their intent: they believed that restricting sexually explicit materials would make prisons more punitive. Regardless of the merit of this argument as a matter of fact, it is clear that as a matter of law, any such concerns cannot be addressed without considering the legitimate First Amendment rights of prisoners.

The government attempt to define the scope of the statute through the new regulation does not cure it of is non-neutral nature. For example, in the revised Program Statement issued in conjunction with the new regulation, the BOP draws a curious distinction between certain publications, banning magazines such as Playboy and Penthouse, but permitting publications such as the Sports Illustrated Swimsuit Issue and the Victoria Secret catalogue. Program Statement 5266.07 at 7 (Nov. 1, 1996) (Appendix I to Defendants' Motion to Dismiss). While there is little doubt that Playboy and Penthouse have stronger sexual content, there is no reason to believe that they are any more or less rehabilitative than the latter two publications. If rehabilitation was the content neutral goal of the Ensign Amendment, then presumably it would ban all non-rehabilitative publications. If anything, the distinction drawn by the new program statement further emphasizes the non-neutral nature of the Ensign Amendment.

The Court is certainly sensitive to the fact that certain prisoners should not receive certain sexually explicit materials. Furthermore, there are certain sexually explicit materials that no prisoner should receive. The government won its right to pursue those concerns in *Thornburgh* when the Supreme Court upheld the 1979 regulations. Those regulations took a common sense approach: they gave wardens the discretion to keep sexually explicit materials from sexual predators and to restrict certain materials that posed security risks. Unfortunately, the Ensign Amendment does not take this careful, constitutionally-sensitive approach.

Because the Court finds that the Ensign Amendment violates the "neutrality" prong of the *Turner* test, it is not necessary to reach the remaining factors. Even if the statute was deemed to be "neutral," it is significant that under the broad terms of the statute and regulation, the materials banned do not need to be "obscene" or "pornographic." Accordingly, any publication that is deemed to contain sexually explicit language or nudity comes within the Ensign prohibition. It is doubtful that this broad incursion on the First Amendment could pass constitutional muster.

CONCLUSION

It is of concern to this Court that this law ignores the history of careful and time-tested regulation and replaces it with a hastily-drafted statute tagged on to a massive budget bill. It is clear that this Amendment had nothing to do with budgetary concerns. The cost of monitoring materials, returning them to their publishers and mailing out notifications clearly exceeds the *de minimis* cost of simply distributing publications. It is also clear that the Amendment was passed with little consideration of its consequences. There was no Congressional finding that the old regulations were deficient in some manner. There was no Congressional finding that this Amendment would serve a rehabilitative purpose, or any other purpose. There was no investigation into the practical concerns raised in enforcing such a statute.[5]

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[5] It is the Court's understanding that the way the Bureau of Prisons intends to discharge its obligations under the law is to ban outright certain well-known adult periodicals, such as Playboy and Penthouse. The Bureau successfully argued in *Thornburgh v. Abbott, supra* at 418-19, 109 S.Ct. at 1884-85. that tearing out rejected pages from a publication would create too much discontent among prisoners and is not, therefore, a reasonable alternative to an "all-or-nothing" rule. But even assuming, *arguendo*, that

And there was no consideration of the Constitutional concerns raised by such legislation.

Because the Court finds that the Ensign Amendment is not "neutral," the Court holds, pursuant to *Turner v. Safley, supra*, that it is facially violative of the First Amendment. Accordingly, the Court declares the Ensign Amendment unconstitutional, and grants Plaintiffs' motion for permanent injunctive relief. An appropriate order follows this Memorandum Opinion.

ORDER

This matter is before the Court on Plaintiffs' motion for declaratory judgment and permanent injunctive relief and Defendants' cross-motion to dismiss. For the reasons stated in the attached Memorandum Opinion, the Court hereby

DECLARES that Section 614 of the Omnibus Appropriations Act of 1997, Pub.L. No. 104-208, § 614, 110 Stat. 3009 (Sept. 30, 1996) (the "Ensign Amendment") to be facially violative of the First Amendment to the United States Constitution. Accordingly, it is hereby

ORDERED that the Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, be **PERMANENTLY ENJOINED** from enforcing Section 614 of the Omnibus Appropriations Act of 1997, Pub.L. No. 104-

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there is some basis for keeping from prisoners the pages of Penthouse and Playboy that contain nudity or sexually explicit language, it is hard to envision any First Amendment rationale for restricting the non- offending, non-sexual articles often found in such publications.

208, § 614, 110 Stat. 3009 (Sept. 30, 1996) (the "Ensign Amendment"). Because there are no further outstanding issues in this case, it is further

ORDERED that this case be **DISMISSED**.

APPENDIX C

Joseph AMATEL, et al., Appellees
v.
Kathleen Hawk, Director, Bureau of Prisons, et al., Appellants

Nos. 97-5293, 97-5294, 97-5295.

United States Court of Appeals,
District of Columbia Circuit.
Dec. 11, 1998

BEFORE: Edwards, Chief Judges; Wald, Siberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appellees' Petition For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Deputy Clerk

WALD, *Circuit Judge*, dissenting from the denial of rehearing *in banc*:

For the reasons set out in my dissent to the panel opinion, I would grant in banc hearing. The blanket ban on distributing commercial publications featuring nudity or "sexually explicit" pictures applies to all federal prisoners, old, young, men, women, detainees as well as convicted offenders, imprisoned for all crimes, violent or not, sex-related or not. The ban is justified by the government solely on "rehabilitative" grounds (not on security) but without any documentation to display a nexus of any kind between such a total ban and general or specific rehabilitative grounds. We deal here with a First Amendment right, albeit one which may be restricted in the case of prisoners if the restriction is "reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. 78, 89 (1978). Although common sense may on occasion substitute for social science data, this total ban on nudity and sexually explicit pictures is not even commonsensical, defended as it is only by an elusive rehabilitiation goal. Under existing law, even Congress may not do anything it pleases to prisoners' First Amendment rights without rational justification. In similar cases involving state prisons, other federal courts have found this kind of blanket ban on nudity and sexually explicit material unconstitutional. *Mauro v. Arpaio,* 147 F.3d 1137 (9th Cir. 1998) (panel opinion withdrawn and *in banc* hearing granted December 2, 1998); *Waterman v. Verniero,* 12 F.Supp. 2d 378 (D.N.J. 1998). On the basis of prior First Amendment and prisoners' rights law, this case merits in banc consideration.

APPENDIX D

Ensign Amendment

Pub. L. No. 104-208 (HR 3610)
September 30, 1996

OMNIBUS CONSOLIDATED APPROPRIATIONS ACT, 1997

An Act making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes.

* * * * *

SEC. 614. None of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity.

APPENDIX E

REGULATORY PROVISIONS INVOLVED

FROM TITLE 28 JUDICIAL ADMINISTRATION
PART 540 CONTACT WITH PERSONS IN COMMUNITY
SUBPART F - INCOMING PUBLICATIONS

§ 540.70 Purpose and scope.

Except when precluded by statute (see § 540.72), the Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this subpart, means a book, booklet, pamphlet, or similar document, or a single issue of a magazine, periodical, newsletter, newspaper, plus such other materials addressed to a specific inmate such as advertising brochures, flyers, and catalogs.

[44 FR 38260, June 29, 1979, as amended at 47 FR 55129, Dec. 7, 1982; 61 FR 57568, Nov. 6, 1996]

§ 540.71 Procedures

(a) An inmate may receive hardcover publications and newspapers only from the publisher, from a book club, or from a bookstore. An inmate may receive other softcover material (for example, paperback books, newspaper clippings, or magazines) from any source. The Warden may have all incoming publications inspected for contraband. The Warden may designate staff to review and where appropriate to approve all incoming publications in accordance with the provisions of this subpart. Only the Warden may reject an incoming publication.

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) It depicts or describes procedures for the construction of use of weapons, ammunition, bombs or incendiary devices;

(2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;

(3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;

(4) It is written in code;

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(6) It encourages or instructs in the commission of criminal activity;

(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reasons to reject the subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Program unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 20 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Program, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

(f) The Warden may set limits locally (for fire, sanitation or housekeeping reasons) on the number or volume of publications an inmate may receive or retain in his quarters. The Warden may authorize an inmate additional storage space for storage of legal materials in accordance with the Bureau of Prisons procedures on personal property of inmates.

[44 FR 38260, June 29, 1979, as amended at 45 FR 75126, Nov. 13, 1980; 47 FR 55130, Dec. 7, 1982; 50 FR 411, Jan. 3, 1985; 61 FR 57568, Nov. 6, 1996]

§ 540.72 Statutory restrictions requiring return of commercially published information or material which is sexually explicit or features nudity.

(a) When commercially published information or material may not be distributed by staff or made available to inmates due to statutory restrictions (for example, a prohibition on the use of appropriated funds to distribute or make available to inmates information or material which is sexually explicit or features nudity), the Warden or designee shall return the information or material to the publisher or sender. The Warden or designee shall advise the publisher or sender that an independent review of the decision may be obtained by writing to the Regional Director within 20 days or receipt of the notification letter. Staff shall provide the inmate with written notice of the action.

(b) Definitions: For the purpose of this section:

(1) Commercially published information or material means any book, booklet, pamphlet, magazine, periodical, newsletter, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made

available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items.

(2) Nudity means a pictorial depiction where genitalia or female breasts are exposed.

(3) Features means the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition.

(4) Sexually explicit means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation.

[61 FR 57569, Nov. 6, 1996]

APPENDIX F

Program Statement

OPI: C.D.
NUMBER: 5266.07
DATE: November 1, 1996
SUBJECT: Incoming Publications

EFFECTIVE DATE: December 1, 1996

* * * * *

6. [STATUTORY RESTRICTIONS REQUIRING RETURN OF COMMERCIALLY PUBLISHED INFORMATION OR MATERIAL WHICH IS SEXUALLY EXPLICIT OR FEATURES NUDITY § 540.72]

Section 614 of the Fiscal Year 1997 Omnibus Budget Act (P.L. 104-208) specifies:

"None of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal Official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity."

Implementation procedures for this provision are given below and affect those publications received on or after December 1, 1996.

Publications previously distributed/authorized shall be retained and transferred in accordance with current policy on

Inmate Personal Property.

[a. When commercially published information or material may not be distributed by staff or made available to inmates due to statutory restrictions (for example, a prohibition on the use of appropriated funds to distribute or make available to inmates information or material which is sexually explicit or features nudity), the Warden or designee shall return the information or material to the publisher or sender. The Warden or designee shall advise the publisher or sender that an independent review of the decision may be obtained by writing to the Regional Director within 20 days of receipt of the notification letter. Staff shall provide the inmate with written notice of the action.]

The Warden's authority in this subsection a. ordinarily is delegated to Mail Room staff.

Mail Room staff shall return publications found to be non-distributable on the basis of the definitions listed below in subsection b. The publications shall be returned along with the appropriate Attachment. Ordinarily, the outside cover shall be used to assess content or the need for perusal.

For the purpose of this Section, written text in the publication does not qualify a publication as sexually explicit.

Non-distributable publications may be returned to the sender or publisher in bulk annotating the number of returned copies (see Notification to Publisher of Return of Publication (Attachment B). Materials extracted, photocopied, or clipped from such publications shall also be returned to the sender with a Notification to Sender of Return of Materials (Attachment C).

Under this subsection a., there is no need to delay the return of non-distributable publications or materials even when an inmate files an appeal under the Administrative Remedy Program because the statutory restriction on making the material available precludes any inmate review of the material.

Inmates shall be notified via use of the Notification to Inmate of Return of Publication or Materials (Attachment D). Although the publication or material is to be returned, the Warden shall insure that a copy of the publication cover and one page of the banned information or material is copied and retained at the institution in event of a subsequent appeal by the inmate or publisher/sender. While inmates may use the Administrative Remedy Program to appeals return of the material, pursuant to the statutory provision cited above, the Federal Bureau of Prisons may not make available to inmates copies of this material. Accordingly, it will not be permissible for inmates to review such copies in connection with their administrative remedy filings.

The Warden need make only one copy of the retained, statutorily prohibited information, even if that publication is received by many inmates. For example, if 20 inmates receive the December 1996 publication of XYZ, and that publication cannot be made available under Section 6., only one set of the materials needs to be retained. A copy of the notification sent to each inmate would then be attached to the retained material.

[b. Definitions: For the purpose of this section:

(1) Commercially published information or material means any book, booklet, pamphlet, magazine, periodical, newsletter, or similar document, including stationery and

greeting cards, published by an individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items.

(2) Nudity means a pictorial depiction where genitalia or female breasts are exposed:

(3) Features means the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition.]

The following are examples of commercial publications which, based on current practices of the publisher, may be distributed to inmates even though they may contain nudity because the publication does not feature nudity as defined above:

- National Geographic
- Our Body, Our Selves
- Sports Illustrated (Swimsuit Issue)
- Victoria Secret catalog

Any publication may change a single issue or its general policies and practices at any time which would allow it to become acceptable or non-acceptable for distribution. The above examples are guidelines only and are subject to change.

[(4) Sexually explicit means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation.]

Publications with sexual content which are not returned through application of the procedures in Section 6 are still subject to rejection through application of the procedures in Section 5 b.(7) of this Program Statement.

For example, publications which contain sexually explicit test or which feature sado-masochism, bestiality, or which involve children may not meet the definitions in this Section for "sexually explicit" or "nudity," but may be considered sexually explicit under Section 5 b.(7).

Supreme Court, U.S.
FILED
MAY 26 1999
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No. 98-1452

In the Supreme Court of the United States

JOSEPH AMATEL, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decisions in *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), in upholding a federal statute that bars federal prisoners from receiving commercially published materials that are sexually explicit or feature nudity.

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In the Supreme Court of the United States

No. 98-1452

JOSEPH AMATEL, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 156 F.3d 192. The opinion of the district court (Pet. App. 50a-62a) is reported at 975 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1998. The petition for rehearing was denied on December 11, 1998 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on March 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Ensign Amendment, which Congress enacted as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 614, 110 Stat. 3009-66, bars the Federal Bureau of Prisons (BOP) from using appropriated funds to distribute to prison inmates commercial material that "is sexually explicit or features nudity." The United States District Court for the District of Columbia enjoined enforcement of the Ensign Amendment, ruling that it violated the First Amendment rights of prison inmates. Pet. App. 50a-62a. The court of appeals reversed that ruling, vacated the injunction, and remanded the case for further proceedings. *Id.* at 1a-49a.

1. Before the enactment of the Ensign Amendment, the BOP regulated prisoners' receipt of publications through regulations and an internal policy that generally permitted an inmate to receive hardcover publications from the publisher, a book club, or a bookstore and to receive softcover publications, such as books, newspaper clippings, or magazines, from any source. See 28 C.F.R. 540.70-540.71 (1996); Program Statement (PS) 5266.06 (Apr. 26, 1985). Under Section 5b, the warden had authority to inspect incoming publications and could reject a publication if he determined that it was "detrimental to the security, good order, or discipline of the institution" or that "it might facilitate criminal activity." *Ibid.* The warden could not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant." *Ibid.* Section 5 b.(7) of PS 5266.06 contained a nonexclusive list of types of publications that could be rejected, including "sexually explicit material which by its nature

or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity." *Ibid.* This Court had rejected First Amendment challenges to an earlier, substantially similar version of that Program Statement, PS 5266.05 (Jan. 2, 1985). See *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); Pet. App. 3a.

2. In 1996, Congress enacted the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. Section 614 of that Act—commonly known as the "Ensign Amendment"—provides:

> None of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity.

110 Stat. 3009-66. Representative Ensign proposed that amendment on the ground that "[m]agazines that portray and exploit sex acts have no place in the rehabilitative environment of prison, nor should we pay Bureau of Prison[s] staff to distribute them." 142 Cong. Rec. 18,883 (1996).

The BOP implemented the Ensign Amendment by interim rule, effective December 1, 1996. See 61 Fed. Reg. 57,568. The interim rule, among other things, added a section to BOP regulations dealing with statutory restrictions requiring the return of commercially published material that is sexually explicit or features nudity. See 28 C.F.R. 540.72(a). The new section of the regulations also defined some terms in the Ensign Amendment, including "nudity," "features," and "sexually explicit." "Nudity" was defined to mean "a pictorial depiction where genitalia or female breasts are exposed." 28 C.F.R. 540.72(b)(2). "Features" was defined to mean that "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition." 28 C.F.R. 540.72(b)(3). "Sexually explicit" was defined to mean "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation." 28 C.F.R. 540.72(b)(4).[1]

In addition, the BOP issued a revised Program Statement, PS 5266.07 (Nov. 1, 1996), on incoming publications. That revision included essentially all of the prior version upheld in *Thornburgh* but also added a new Section 6, which provided instructions for the return of publications covered by the Ensign Amendment, along with an explanation of the revised regulations. Pet. App. 71a-75a. Program Statement 5266.07 gave examples of commercial publications that could be distributed to inmates even though they may *contain* nudity, because they do not *feature* nudity: National Geographic; Our Body, Our Selves; Sports Illustrated (Swimsuit Issue); and the Victoria's Secret catalog.

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[1] The regulations also defined "commercially published information or material" to mean "any book, booklet, pamphlet, magazine, periodical, newsletter, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items." 28 C.F.R. 540.72(b)(1).

Pet. App. 74a. It explained that publications with sexual content that were not returned under Section 6 were still subject to rejection under Section 5 b.(7), the provision carried forward from earlier versions of the Program Statement dealing with sexually explicit material that, by its nature or content, poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity. Pet. App. 75a; PS 5266.07.

3. The current litigation began as three separate actions initiated by prison inmates, which the district court consolidated. Appointed counsel filed an amended complaint on behalf of the three inmates and also on behalf of Playboy Enterprises, Inc., publisher of Playboy magazine; General Media Communications, Inc., publisher of Penthouse magazine; and the Periodical and Book Association of America, Inc., which describes itself as a trade association of magazine and paperback book publishers. See Pet. App. 4a, 51a.

The amended complaint challenged the Ensign Amendment on its face and as applied to petitioners, claiming that the statute and implementing regulations were not rationally related to a legitimate penological interest, were unconstitutionally overbroad, improperly singled out one class of protected speech (pictorials) without banning other protected speech (text), and were excessively vague in violation of the First and Fifth Amendments. Petitioners moved for a preliminary injunction, and the government moved to dismiss. Neither side submitted any materials outside the pleadings. The district court ruled that the Ensign Amendment is "facially violative of the First Amendment," Pet. App. 61a, and permanently enjoined enforcement of the statute, *id.* at 50a-62a.

The district court first concluded that the Ensign Amendment should be reviewed under the reasonableness standard of *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Thornburgh* v. *Abbott, supra*. Pet. App. 56a. Under that test, prison regulations are valid if they are "reasonably related to legitimate penological interests." *Safley*, 482 U.S. at 89. This Court has identified four considerations that are relevant to that determination: (1) whether the government objective is legitimate and neutral and the regulations are rationally related to that objective; (2) whether alternative means remain open for inmates to exercise the right at issue; (3) whether setting aside the regulations may adversely affect others, including guards and other inmates; and (4) whether the regulations are an "exaggerated response" to prison concerns. See *Thornburgh*, 490 U.S. at 414-419. The district court concluded that the Ensign Amendment does not satisfy the first of those four considerations. See Pet. App. 56a-57a. The court recognized that rehabilitation—the interest asserted by the government here—is a legitimate penological interest, but it held that the Ensign Amendment nevertheless imposes an unconstitutional restriction on prisoner rights because it is content-based and therefore not "neutral." *Id.* at 57a-60a.

4. The court of appeals reversed. Pet. App. 1a-49a. The court of appeals concluded, at the outset, that the district court had misunderstood *Turner*'s and *Thornburgh*'s references to "neutrality." *Id.* at 10a-11a. In evaluating whether Congress has a neutral objective, the district court had "looked at the statute itself, not the goal." *Id.* at 10a. The court of appeals explained that "'neutral' here means no more than that 'the regulation or practice in question must further an important or substantial governmental interest unrelated

to the suppression of expression.'" *Ibid.* (quoting *Thornburgh*, 490 U.S. at 415). The court reasoned that "rehabilitation, and such character-moulding as may be implicit therein, constitute legitimate and neutral goals as those are understood in [*Turner*]." *Id.* at 13a.

The court of appeals then considered the four factors set out in *Turner* and *Thornburgh* and concluded that the Ensign Amendment does not violate the First Amendment. The court first determined that Congress could properly find that there is a "valid, rational connection" between restricting inmates' access to pornography and promoting their rehabilitation. Pet. App. 14a-18a. The court explained that it is not unreasonable for Congress to believe that pornography could "thwart the character growth of its consumers," *id.* at 14a, and that, even if that legislative judgment is debatable, it is "within the realm of reason under the standards applicable to the political branches' management of prisons." *Id.* at 18a. The court of appeals next observed that the Ensign Amendment continues to afford prisoners an opportunity to receive a "broad range" of alternative reading materials, *id.* at 19a (quoting *Thornburgh*, 490 U.S. at 418), including "all written forms of smut not barred by the regulations upheld in *Thornburgh*." *Id.* at 19a n.7. The court noted that setting aside the Ensign Amendment could adversely affect guards and other inmates in light of the prospect that distribution of pornography in prison could increase the risk of prison rape. *Id.* at 19a. Finally, the court concluded that the most obvious alternative to the Ensign Amendment's categorical ban—"a detailed prisoner-by-prisoner (and presumably publication-by-publication) sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner"—would impose serious administrative burdens that a general ban would avoid. *Id.* at 20a.

The court of appeals rejected petitioners' request for a remand to allow them to introduce evidence in support of their position, stating that they had "misconceive[d] the legal issue under [*Turner*]." Pet. App. 23a. The court explained that the issue is "not whether curtailment of pictorial smut *will* advance the prisons' rehabilitative project, but whether Congress could reasonably have believed that it would do so." *Ibid.* The court added that "[t]he studies cited [by *amici*], coupled with Congress's implicit appeal to ethical norms against the undue stimulation of carnal appetites, indicate the reasonableness of such a belief." *Ibid.* The court did remand, however, for consideration of petitioners' vagueness claim, which the district court had not addressed. *Id.* at 23a-24a.

Judge Wald dissented, reasoning that, while a more limited prohibition might be permissible, the record did not support a connection between the Ensign Amendment's prohibition of the materials and the goal of rehabilitation. Pet. App. 24a-49a.

ARGUMENT

The court of appeals properly applied the analysis set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), to the Ensign Amendment and correctly concluded that the district court erred in declaring the statute unconstitutional. That court is the first and only court of appeals to address the constitutionality of the Ensign Amendment. There accordingly is no conflict among the courts of appeals on the issue warranting this Court's review.

1. This Court has properly recognized that prisoners cannot claim the same breadth of constitutional rights as ordinary citizens, because prisoners' rights are circumscribed by the fact of their incarceration. See *Bell* v. *Wolfish*, 441 U.S. 520, 545-547 (1979). "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 545-546 (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). "The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977).

This Court does not generally apply strict or heightened scrutiny when reviewing prison regulations affecting First Amendment interests. See *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987) (the standard of review is "less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). A "prison regulation [that] impinges on inmates' constitutional rights * * * is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; see *Thornburgh*, 490 U.S. at 409. Strict scrutiny, or even heightened scrutiny, "simply [is] not appropriate" in the context of prison regulations. *Id.* at 409-410. Rather, a deferential standard is "necessary if 'prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Turner*, 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 128)). A more demanding standard would "distort the decisionmaking process" in prison regulation by allowing courts to "become the primary arbiters of what constitutes the best solution to every administrative problem." *Ibid.*

When, as in the case presented here, Congress itself, rather than prison officials, establishes a penological policy, judicial review should be especially deferential. That conclusion follows from two related considerations. First, whenever the Court adjudicates the "constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform'—the Court accords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted). Second, in a challenge to a policy involving prisons, judicial deference is predicated on separation-of-powers concerns as well as on administrative expertise. Judicial deference is required because "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell*, 441 U.S. at 548; see *Turner*, 482 U.S. at 84-85; *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

2. The court of appeals correctly applied those principles in rejecting petitioners' First Amendment challenges to the Ensign Amendment. Congress enacted the Ensign Amendment to exclude from prison those commercial publications that are sexually explicit or feature nudity.[2] Congress did so based on its judgment

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[2] Petitioners misstate the language of the statute, changing the word "feature[]" to "contain[]." Pet. 14 ("material containing nudity"); Pet. 15 ("material containing mere nudity"); Pet. 24 ("magazines containing mere nudity"). "Featur[ing]" means more than simply *containing* nudity; it means *giving special prominence to* nudity. As the regulations implementing the statute interpret the term, "features" means that "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular

that those publications have the potential to interfere with the rehabilitation of federal prisoners, whose criminal acts have led to their placement in a restrictive prison environment. As Representative Ensign explained, "Congress should not be fueling the sexual appetites of offenders, especially those who have been convicted of despicable sex offenses against women and children. Magazines that portray and exploit sex acts have no place in the rehabilitative environment of prison, nor should we pay Bureau of Prison[s] staff to distribute them." 142 Cong. Rec. 18,883 (1996). "While a number of factors determine whether a prisoner will become a law abiding citizen upon release from prison, cutting prisoners off from their sexually explicit magazines will certainly do no harm." *Ibid.*[3]

The court of appeals properly recognized that rehabilitation is a legitimate penological interest under *Turner* and *Thornburgh*. Pet. App. 9a-10a. Petitioners do not seriously dispute that point.[4] The court of

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basis or promotes itself based upon such depictions in the case of individual one-time issues." 28 C.F.R. 540.72(b)(3).

[3] Those pre-enactment statements refute petitioners' claim that the government's invocation of rehabilitation is a "post hoc assertion." Pet. 14; see Pet. 18.

[4] This Court has repeatedly made that point. See, *e.g.*, *O'Lone*, 482 U.S. at 348 ("limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security"); *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974) ("since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody"); *Martinez*, 416 U.S. at 404 ("Prison administrators are responsible * * * for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody."); see also, *e.g.*, *Dawson* v. *Scurr*, 986 F.2d 257, 260 (8th

appeals also correctly held that the Ensign Amendment and its implementing regulations are "reasonably related" to that legitimate objective. *Id.* at 10a-18a. The court explained that Congress "could rationally have seen a connection between pornography and rehabilitative values." *Id.* at 14a. It noted that Congress's judgment found support in legal and sociological literature, as well as in common experience. *Id.* at 14a-18a. "Common sense tells us that prisoners are more likely to develop the now-missing self-control and respect for others if prevented from poring over pictures that are themselves degrading and disrespectful." *Id.* at 16a. Congress's judgment is at least sufficiently sensible "to place the legislative judgment within the realm of reason under the standards applicable to the political branches' management of prisons." *Id.* at 18a. See *Turner*, 482 U.S. at 89-90 (the "logical connection" between the regulation and the asserted good may not be "so remote as to render the policy arbitrary or irrational"); *Bell*, 441 U.S. at 539 ("arbitrary or purposeless").

Petitioners contend that the court of appeals' decision is wrong because it subjects prison regulations to "mere rational basis review." Pet. 13. The court of appeals,

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Cir.) ("[r]ehabilitation is also a legitimate objective" for rules limiting access to sexually explicit materials), cert. denied, 510 U.S. 884 (1993). We note that, under the Sentencing Reform Act of 1984, rehabilitation is not a basis for *imposing* a sentence of imprisonment. 18 U.S.C. 3582(a). However, with respect to persons who have been sentenced to prison to further another penological goal (punishment, deterrence, or incapacitation), rehabilitation is of great importance. Since the vast majority of federal prisoners will return to society at some point, it is a matter of the highest concern that those prisoners not return to a life of crime upon their release.

however, relied on exactly the standard that this Court enunciated in *Turner* and *Thornburgh*: "the relevant inquiry is whether the actions of prison officials [are] 'reasonably related to legitimate penological interests.'" *Thornburgh*, 490 U.S. at 409 (quoting *Turner*, 482 U.S. at 89). The court of appeals explicitly considered the four factors that the Court stated "are relevant to, and that serve to channel, the reasonableness inquiry." *Id.* at 414. See Pet. App. 14a-20a. There is no merit to petitioners' contention that the court of appeals departed from the *Turner-Thornburgh* framework. The court of appeals simply applied that reasonableness standard to a congressional enactment and concluded that Congress's judgment withstands analysis under this Court's decisions, which recognize that the setting of prison policies is a matter "peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 85.

3. No other court of appeals has addressed the constitutionality of the Ensign Amendment, and there accordingly is no conflict among the courts of appeals respecting the statute's validity. Petitioners nevertheless contend that the court of appeals' decision conflicts in principle with other appellate decisions that have applied *Turner* and *Thornburgh* to various other questions of prison administration. See Pet. 13-27. Petitioners primarily argue that those decisions have required a stronger showing of the reasonableness of the prison policy at issue than the showing that the court of appeals accepted here. See, *e.g.*, Pet. 16-19, 22-23. Petitioners' reliance on those decisions is misplaced.

First, each of the cases that petitioners cite as requiring the government to provide "evidence" to support the need for a particular prison regulation, Pet.

16-19, involved a challenge to a prison official's determination of an administrative policy, and not a challenge to Congress's determination of a legislative policy. The courts' requirement that prison officials provide "evidence" in support of their policies arises largely as a matter of administrative law, which dictates that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943); see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Life Ins. Co.*, 463 U.S. 29, 43 (1983) (a court "may not supply a reasoned basis for the agency's action that the agency itself has not given"). The Administrative Procedure Act requires that "an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990). That approach, however, does not apply to congressional enactments. Courts "never require a legislature to articulate its reasons for enacting a statute." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Second, the courts use the term "evidence" somewhat loosely in those cases to refer generally to the agency's rationale for the policy, rather than to conventional trial evidence. For example, the court stated in *Swift* v. *Lewis*, 901 F.2d 730, 731-732 (9th Cir. 1990), that prison officials had "failed to provide *any* evidence that the interests they have asserted are the actual bases for their grooming policy" and that they must produce "some evidence that their policies are based on legitimate penological justifications" or else "judicial review of prison policies would not be meaningful." The court's use of the term "evidence" in that context refers to an explanation of the policy's purpose. Similarly, in

Shimer v. *Washington*, 100 F.3d 506 (7th Cir. 1996), the court was troubled by the fact that the prison authorities submitted in court only "the prison regulations, which do not contain the disputed policy, and an affidavit of Patricia Lubben, manager of the prison policy unit, who states only the policy, with *no illumination as to its purpose*." *Id.* at 510 (emphasis added).[5]

Third, the cases cited by petitioners indicate that the courts require "evidence" in support of a prison policy when the prison officials' policy is contrary to common sense. See, *e.g.*, *Shimer*, 100 F.3d at 510 ("We, in fact, are reduced to speculation when not provided with evidence, and, having speculated, find it difficult to establish a connection between the prison administration's unsubstantiated justifications and its policy."); *Walker* v. *Sumner*, 917 F.2d 382, 387 (9th Cir. 1990) ("Not only is there a complete absence of evidence as to why the officials conducted the mandatory blood tests, but the record does not reveal what, if anything, the officials intended to do with the information obtained."); *Reed* v. *Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) ("No evidence of such a danger [of racial conflict] was presented, and in any event it is not easy to see how forcing Rastafarians to cut their hair is going to change this belief [that blacks are superior to whites].").[6] Here, in contrast, common sense supports Congress's statutory policy, as the court of appeals made clear. Pet. App. 15a. See *Giano* v. *Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995) ("common sense" is enough to support prison policy lacking factual support in record).[7]

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[5] As another example, petitioners quote (Pet. 19) the court's reference to "evidence" in *Mann* v. *Reynolds*, 46 F.3d 1055 (10th Cir. 1995). That reference, however, is sandwiched between a statement that the court found it "disturbing in the *Turner* context" that the prison officials "have not provided an explanation why they have singled out attorneys for the restricted contact," *id.* at 1060, and another statement criticizing "the State's failure to provide any rationale for its non-contact policy." *Id.* at 1061. See also *Walker* v. *Sumner*, 917 F.2d 382, 385 (9th Cir. 1990) (stating that prison officials "must provide *evidence* that the interest proferred [sic] is the reason why the regulation was adopted or enforced").

In short, the decisions cited by petitioners do not support their broad proposition that the court of appeals erred in failing to require Congress to provide evidence in support of its policy judgment. There is no conflict between those decisions and the court of appeals' decision below that would warrant this Court's review.

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[6] See also *Mann*, 46 F.3d at 1060-1061 ("record demonstrates a lack of rationality in the denial of contact between Inmates and their counsel," and prison officials failed to provide "any evidence the restrictions on contact were reasonably related to prison security"); *Muhammad* v. *Pitcher*, 35 F.3d 1081, 1085 (6th Cir. 1994) ("In light of the fact that the prison is already opening legal mail from private attorneys, courts, and legal assistance organizations, in the presence of the inmates who submit such requests, it seems to us that opening mail from the Attorney General's Office in the presence of these inmates would entail little or no additional burden.").

[7] The congressional policy here, in any event, finds support in a variety of studies on the effects of pornography. See Pet. App. 16a-17a. While there may be a difference of opinion on the relationship between pornography and inmate recidivism, the issue here is only whether the Ensign Amendment policy has a reasonable relationship with the goal of rehabilitation. As this Court has held, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude" in addressing such problems. *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997). See Pet. App. 17a-18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1999

Supreme Court, U.S.
FILED
JUN 7 1999
CLERK

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No. 98-1452

IN THE
Supreme Court of the United States

JOSEPH AMATEL, *et al.*,
Petitioners,
v.

JANET RENO, Attorney General of the United States, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the D.C. Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The brief in opposition submitted by the United States confirms the need for plenary review. The United States does not dispute that the legal question presented — the standard by which every constitutional challenge brought in the prison context is to be measured — is of critical importance. Nor does the government make any meaningful attempt to grapple with the majority's decision. It instead attempts to avoid that decision, failing even to acknowledge that the majority expressly equated the *Turner* test with the same rational basis review that applies to economic regulations. Because the majority's decision irreconcilably conflicts with the interpretation of *Turner* adopted by several circuits, and effectively precludes prisoner from vindicating their constitutional rights — including First Amendment speech and religious rights — it should be accepted for review.

1. In its Opposition, the government utterly fails to address the majority's equation of *Turner* with mere rational basis review. The government asserts that it is petitioners' contention that the majority's decision "subjects prison regulations to 'mere rational basis review,'" Opp. at 12, but asserts that, instead, the majority below "relied on exactly the standard that this Court enunciated in *Turner* and *Thornburgh*. . . ." Opp. at 13. But that argument is squarely foreclosed by the majority's own statement:

> Prison jurisprudence is not well enough developed to indicate precisely how demanding the requirement of rational means-end connection is. But the similarity between *Safley's* phrasing and the language of *rational basis review* suggests to us that, as far as the means-end fit is concerned, *Safley's standard is, if not identical, something very similar.*

Pet. App. 14a (*citing Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)) (emphasis added).

2. The government's failure to even acknowledge the majority's *express* reduction of *Turner* to mere rational basis review is telling. The reason it fails to do so is clear: the majority's reduction of *Turner* to rational basis review creates a direct split of authority between the D.C. Circuit and other circuits. In response, the government argues that because the D.C. Circuit "is the first and only court of appeals to address the constitutionality of the Ensign Amendment," Opp. at 8 there is "no conflict among the court of appeals" on that precise question. Opp. at 13. That is certainly true, but it is a non

sequitur. It says nothing about the conflict that the decision creates over the substantive *standard* that courts are to apply in evaluating a prisoner's constitutional claim under *Turner*. There is clearly a split over that broader question.

In response to *that* conflict, the government asserts a hodge-podge of reasons that, it claims, distinguish the cases cited in the petition from the majority's decision. Its attempt is unavailing. First, the government asserts that although evidence may be required when a regulation that directly impacts constitutional rights is promulgated by prison personnel, no evidence is required when the same regulation is promulgated by Congress. Opp. at 13-14. As an initial matter, the majority below did not rely on that distinction but instead found that the *Turner* test — which applies to the review of *all* constitutional challenges in the prison context — requires no showing of a reasonable nexus between the challenged regulation and the rationale the government relies upon to defend that regulation. *See*, *e.g.*, Pet. App. 23a.

More fundamentally, however, even if it must be presumed that Congress enacts a statute for a legitimate purpose, that does not mean that the statute is utterly free from judicial scrutiny.[1] At a minimum, the government must demonstrate that there is a sufficient degree of fit between its purpose and its action to withstand review. *See, e.g., Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must *demonstrate* that the recited harms are real, not conjectural, and that the regulation will in fact alleviate these harms in a material way.") (emphasis added, internal citation omitted). Thus, even if the government's interest underlying a regulation is assumed to be valid, the government must make *some* showing that the regulation furthers that interest.

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[1] Although the government claims that the rationale articulated here is not post hoc, it cites only the isolated comments of Representative Ensign. *See*, *e.g.*, Opp. at 3 (citing Representative Ensign's statement that prisons are a "rehabilitative environment"). These descriptive statements do not demonstrate that even Representative Ensign believed there was a specific problem Congress needed to address. Indeed, at best, Representative Ensign appeared to believe that "cutting prisoners off from their sexually explicit magazines will certainly do no harm." 142 Cong. Rec. 18,883 (1996). Even if Representative Ensign's statement could be interpreted as his belief that banning all adult material furthers some undefined

This Court's decision in *Turner v. Abbott* makes clear that this principle applies when courts review regulations that impact constitutional rights in prisons. In *Turner* the Court assumed that the prison system's interest in security was genuine and legitimate. That, however, did not end the inquiry. Instead, the Court scrutinized the regulation and found that, given the record before it, the government had not *demonstrated* that the regulations sufficiently furthered the government's asserted purpose to allow the regulation to be sustained. *Turner* at 97-99.

The government next claims that even if some courts of appeals have interpreted *Turner* as requiring evidence to be presented, these courts, "use the term 'evidence' somewhat

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rehabilitative purpose, that isolated remark alone cannot serve to demonstrate Congressional intent. And it is undisputed that prior to passage of the Ensign Amendment, Congress held no hearings, received no evidence, issued no committee reports, and made no finding that material featuring nudity harmed rehabilitation in any way.

loosely," Opp. at 14, and that by "evidence" the courts mean merely an articulated rationale or "common sense." *Id.* But these courts have plainly required something more than a mere assertion of purpose. *See, e.g.*, *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990) (holding that in the face of a constitutional challenge to a prison regulation, the government "must first identify the specific penological interest involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interest. *An evidentiary showing is required as to each point.*") (emphasis added).

Moreover, even where courts have accepted the government's assertion as to purpose, they have required that the government demonstrate that the purpose is, in fact, furthered by the regulation. In *Shimer v. Washington*, for example, as the government notes, the regulations and the affidavit submitted by the prison warden in support of the regulations did not indicate the purpose behind the regulations. Opp. at 15. But in *Shimer*, as in this case, the government did assert that the regulations furthered a legitimate interest. There, the interest asserted to support the ban on guards' writing recommendation letters to parole boards was guarding against corruption and coercion. No party contested that these were legitimate purposes. But the *Shimer* court found no plausible connection between the regulation and the state's asserted interest because there was no *evidence* that, in fact, there was a reasonable nexus between the interest asserted and the ban. "In order to make [the] inquiry" required by *Turner*, the court found, "[t]he prison administration must proffer some evidence to support its restriction. . . ." *Shimer v. Washington*, 100 F.3d 506, 509 (7th Cir. 1996). Absent such a demonstration, the regulation must fall because "*[e]vidence* to suggest this connection should be at the heart of the *Turner* analysis." *Id.* at 510 (emphasis added); *accord Walker v. Sumner, supra.* Similarly, in *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th cir. 1995), the court did not challenge the legitimacy of the government's interest in security. Instead, it struck down the regulation because "defendants were unable to provide any evidence the restrictions on contact were reasonably related to prison security."

The conflict between these decisions and the decision below could not be clearer. The decisions cited in the petition uniformly require the government to submit some evidence in support of the challenged restriction. The majority's decision below stands in sharp and irreconcilable conflict:

> Plaintiffs argue that if we are unpersuaded by the district court's analysis we should remand the case to allow them to introduce evidence supporting their position. But that suggestion misconceives the legal issue under *Safley*. *The question is not whether the curtailment of pictorial smut will advance the prisons' rehabilitation project, but whether Congress could reasonably have believed it would do so.*

Pet. App. at 23a (emphasis added). The majority thus clearly, and unequivocally, found not only that evidence was not required, but that it was irrelevant. Even if plaintiffs had been allowed to show that there was not a reasonable nexus between the ban and the government's interest, the majority indicated that it would have upheld the ban as long as Congress might have *believed* it was furthering its stated purpose. As the Seventh Circuit found in striking down a regulation that was defended, not upon evidence but, as here, with "conjecture," "[t]he potential infringement of the free-speech clause of the

First Amendment is too plain to warrant comment." *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

This is not to say that courts do not diverge on the degree and nature of the evidence that the government must present in defending a prison statute or regulation against constitutional challenge. They do. That does not demonstrate that there is no conflict among the circuits on the proper application of the *Turner* test, however. To the contrary, it confirms that the need for clarification of the *Turner* test is acute.

3. Nothing in the government's opposition seriously suggests otherwise. Indeed, the government's opposition appears to rest largely on the suggestion that the Ensign Amendment was properly upheld (even if the correct standard was not applied) because the Amendment is a mere extension of the prior regulations which were upheld by this Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Opp. 2-5. As an initial matter, that is incorrect. The regulations upheld in *Thornburgh* were different in ways that the *Thornburgh* Court found critically important. Those regulations did not impose a blanket ban, but instead required wardens to make individual determinations about the impact that a given piece of material would have on the security, good order or discipline within the prison. Only material specifically found by the warden or his designee to pose a threat within the prison could be banned. *See Thornburgh*, 490 U.S. at 416 ("[W]e are comforted by the individualized nature of the determinations required by the regulation. Under the regulations, no publication may be excluded unless the warden himself makes the determination that it is 'detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity.'"). And the regulations expressly forbade

banning material solely based on its content.[2] Critically, the *Thornburgh* court recognized that any individual prohibition would be invalid if it was not reasonably related to the government's interest in security, good order or discipline. *See Thornburgh*, 490 U.S. at 419. The Court thus remanded to the district court to make the requisite inquiry about whether a sufficient nexus between the any given exclusion and the government's asserted interest had been met. *Id.*[3]

In any event, whether or not the Ensign Amendment would have been upheld if the majority below applied the standard *Turner* requires is not the question presented by petitioners. The question presented is the purely legal question of whether the standard articulated by the majority for judging constitutional challenges to prison regulations is the correct standard.[4] The majority below found that the test equates to mere rational basis review. That reduction of the *Turner* standard — which effectively eviscerates the ability of prisoners to maintain constitutional challenges to prison regulations — stands in sharp conflict with the decisions of

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2/ Indeed, because the regulations listed the type of material that might meet the standard, the *Thornburgh* case found the validity of the regulation a "closer" question than prior regulations had presented. *Thornburgh*, 490 U.S. at 415.

3/ In discussing the pre-Ensign Amendment regulations, the government simply ignores that, had there been a legitimate concern with rehabilitation, the Bureau of Prisons could simply have amended its regulations to include a prohibition on material that individual wardens found harmed rehabilitation.

4/ Because the standard articulated by the panel is now the law of the circuit, the answer to that question affects not only the validity of the Ensign Amendment, but will affect all constitutional challenges to prison regulations brought in that circuit.

several circuits, and with this Court's decisions in *Turner* and *Thornburgh*. For that reason, the petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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